No. 159

In the Supreme Court of the United States

OCTOBER TERM, 1961

FREDERICK C. LYNCH, PETITIONER

v.

WINFRED OVERHOLSER, SUPERINTENDENT, ST. ELIZABETHS HOSPITAL, WASHINGTON, D.C.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the court of appeals (R. 29–44) is reported at 288 F. 2d 388. No opinion was written by the district court.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1961 (R. 45). The petition for a writ of certiorari was filed on April 17, 1961, and granted on June 19, 1961 (R. 46). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a judge of the Municipal Court for the District of Columbia has jurisdiction to refuse to

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accept a plea of guilty when the plea is made voluntarily with understanding of the nature of the charge.

2. Whether the trial judge abused his discretion by refusing to permit petitioner to plead guilty when it affirmatively appeared that there was grave doubt as to his sanity at the time of the commission of the offenses.

3. Whether, in a federal court, the issue of insanity at the time of the offense is exclusively within the province of the defendant to raise, and evidence of insanity exclusively within his province to introduce.

4. Whether Section 24–301(d) of the D.C. Code, which provides for the commitment of defendants acquitted solely on the ground of insanity, is restricted in its application to defendants who affirmatively plead the insanity defense, plead not guilty, or are charged with crimes of violence.

5. Whether Section 24–301, providing for the commitment of a defendant acquitted on the ground of insanity without a special hearing or finding upon the issue of his insanity at the time of the commitment, but expressly reserving to the defendant the right to establish his eligibility for release in a habeas corpus proceeding, contravenes the due process clause of the Fifth Amendment.

6. Whether the Court should consider, and whether petitioner's trial or subsequent confinement was vitiated by, any of the following alleged constitutional infirmities suggested in this Court: lack of counsel at arraignment, alleged lack of notice of the nature of the proceedings, alleged invalidity of the burden of proof at trial, failure to receive private psychiatric

examination and testimony at government expense, and alleged inadequacy of treatment at St. Elizabeths Hospital.

STATUTES AND RULE INVOLVED

The applicable statutes and rule involved are set forth in the Appendix, *infra*, pp. 88-92.

STATEMENT

1. On November 6, 1959, two informations (U.S. 7736-59 (R. 21-22) and U.S. 7737-59 (R. 25-26)) were filed in the Municipal Court for the District of Columbia, charging petitioner with violations of the District of Columbia bad check law (D.C. Code, § 22-1410, App., *infra*, p. 88).[1]

On the day the informations were filed (R. 22, 26), petitioner waived counsel (R. 21, 25) and entered a plea of not guilty to each information (R. 19). Pursuant to Section 24-301(a) of the D.C. Code (App., *infra*, pp. 89-90), the court ordered petitioner committed to the District of Columbia General Hospital for a mental examination to determine his competency to stand trial (R. 21, 25; see R. 12).[2] Peti-

[1] Specifically, the informations charged that on October 21, 1959 (7736-59) and October 20, 1959 (7737-59) petitioner, with intent to defraud, made, drew, uttered and delivered checks in the amount of $50.00 each, knowing that he did not have sufficient funds in the bank for payment (R. 21-22, 25-26).

[2] The record does not show why the court ordered a mental examination, *i.e.*, whether there was "prima facie evidence" submitted to the court or whether the court acted on the basis of its own observations (see D.C. Code, § 24-301(a), App., *infra*, p. 89). In oral argument before the district court on the petition for habeas corpus, petitioner's counsel said that "he [peti-

tioner was admitted to the hospital on the same day (R. 23).

On December 4, 1959, the hospital, through its Assistant Chief Psychiatrist, reported (R. 23) that psychiatric examination had revealed petitioner "to be of unsound mind, unable to adequately understand the charges and incapable of assisting counsel in his own defense." Stating that petitioner had "shown some improvement since his admission to this hospital," the report recommended "that he be committed to a psychiatric hospital for further care and treatment."[3] On December 28, 1959, the hospital, through the same psychiatrist, submitted a second report, which stated (R. 24) that petitioner had "shown some improvement and at this time appears able to understand the charges against him, and to assist counsel in his own defense." The psychiatrist went on to state that, in his opinion, petitioner "was suffering from a mental disease, i.e., a manic depressive psychosis, at the time of the crime charged," and that "[s]uch an illness would particularly affect his judgment in regard to financial matters, so that the crime charged would be a product of this mental disease." The psychiatrist stated further that peti-

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tioner] came to the Municipal Court and apparently, upon prima facie evidence of some mental unsoundness being presented, he was transferred to the District of Columbia General Hospital for observation" (R. 12). Counsel, who was not present in the Municipal Court (R. 13), and whose statement was not sworn, did not indicate whether the "prima facie evidence" was submitted by petitioner or by the government.

[3] Upon receipt of the report, the trial judge, under the provisions of Section 24-301(a), ordered that petitioner remain at the hospital for treatment (R. 30).

tioner appeared "to be in an early stage of recovery from manic depressive psychosis. It is thus possible that he may have further lapses of judgment in the near future. It would be advisable for him to have a period of further treatment in a psychiatric hospital."

On the following day—December 29, 1959—petitioner, represented by an attorney appointed by the Municipal Court (R. 6, 23), was brought to trial (R. 21, 25). Petitioner then sought to withdraw the pleas of not guilty which he had previously entered and to enter pleas of guilty to the two informations (R. 19). The trial judge, who had before him copies of the hospital reports of December 4, 1959, and December 28, 1959, both of which were attached to one of the informations (R. 23, 24), refused to permit petitioner to change his pleas and proceeded to hear evidence on the charges (R. 19). During the course of the ensuing trial, a physician representing the District of Columbia General Hospital Psychiatric Division testified over petitioner's objection that the crimes with which petitioner was charged were the products of mental illness (R. 19).[4] According to the findings of fact of the district court, "no testimony was offered by the petitioner either with respect to the offenses charged against him or his mental condition at the time said offenses were committed" (R. 19). According to the court of appeals, "[a]t the

[4] The district court, in the habeas corpus action, found that the testimony of the physician was offered by the government as part of its case in chief (R. 19). There is, however, no evidence in the record to support this finding.

trial, it appears that * * * [petitioner] took the stand and denied essential elements of the crimes with which he was charged" (R. 31). No support for either of these contradictory conclusions may be found in the present record.

At the conclusion of the case, the trial judge found petitioner "not guilty on the ground that he was insane at the time of the commission of the offense" (R. 9), and entered a judgment of acquittal by reason of insanity (R. 19). Pursuant to Section 24–301(d) of the D.C. Code (App., *infra*, p. 91), the judge ordered petitioner committed to St. Elizabeths Hospital (R. 9, 19, 20). No appeal was taken.

2. On June 13, 1960, petitioner, represented by new counsel (R. 6), filed in the United States District Court for the District of Columbia a petition for a writ of habeas corpus (R. 3–6), attacking the legality of his confinement on the grounds (1) that the Municipal Court's refusal to permit him to plead guilty under the circumstances of the case deprived him of his liberty without due process of law; (2) that an "impossible burden" had been placed upon him to rebut the psychiatric evidence (of insanity) because the proof required for his commitment was evidence casting only the slightest reasonable doubt upon his sanity; (3) that his commitment violated "the safeguards of the civil commitment law embodied in Title 21, D.C. Code, Section 306 et seq."; (4) that his automatic commitment without evidence of, or a judicial finding of, present dangerousness (*i.e.*, dangerousness at the time of the commitment) deprived him of liberty without due process of law; and (5) that Section 24–301 of the D.C. Code was "unconstitutional on

its face and as construed and applied * * *" because it failed to provide for a judicial finding, on competent and substantial evidence, of mental illness and dangerousness at the time of the trial or, in the alternative, for an immediate report back to the court with a full hearing within a few days after commitment to permit "a judicial finding of present social dangerousness requiring further treatment and deprivation of liberty in a mental institution." (R. 5). The petition also contained language which could be construed as alleging that Section 24–301(d) applies only to defendants who affirmatively raise the insanity defense (R. 5).

The district court permitted petitioner to proceed without prepayment of costs (R. 7) and ordered that the writ of habeas corpus issue (R. 6). Respondent's return and answer, filed on June 16, 1960 (R. 7–8), admitted that petitioner was confined in St. Elizabeths Hospital but denied that such detention was unlawful; stated that petitioner had failed to allege that respondent was acting arbitrarily or capriciously in failing to certify petitioner for release or that petitioner was of sound mind; declared that, during the period of petitioner's confinement in St. Elizabeths Hospital, he had been under the care and observation of the respondent, as well as other members of the medical staff of St. Elizabeths Hospital, skilled in the care, diagnosis and treatment of nervous and mental disorders, who were of the opinion that petitioner had "not recovered from his abnormal mental condition, to wit: Manic-Depressive Reaction, Manic Type"; and concluded that respondent was unable to

certify that petitioner would not be dangerous to himself or others in the reasonable future, by reason of his mental disorder.

After respondent had filed a supplemental return and answer (R. 10–11), proceedings were had in the district court on June 16, 1960, before Judge McGarraghy (R. 12–20). Petitioner's counsel introduced no evidence, but in oral argument recounted what he believed to have transpired in the Municipal Court (R. 12–13), and addressed himself to the legal issues raised by the habeas corpus petition. Counsel for respondent also presented argument to the court on the legal issues. During the course of the argument, the judge rejected petitioner's attack upon the constitutionality of the mandatory commitment procedures set up in Section 24–301 of the D.C. Code, stating that he thought those procedures were constitutional (R. 15). At the termination of the argument, however, the court concluded (R. 18):

> I don't believe that the Municipal Court had a right to convert this proceeding into a civil commitment proceeding, which is what it did. Therefore, I don't think the Municipal Court had jurisdiction to commit him to St. Elizabeths. I will grant the writ.

On June 27, 1960, the district court entered an order stating its findings and concluding (R. 20) that "the Municipal Court lacked jurisdiction to effect such a commitment and thereby permit the government to obtain commitment of the petitioner as of unsound mind by use of a criminal proceeding in substitution for civil commitment procedures established by

law * * *"; accordingly the court ruled that petitioner was illegally detained at St. Elizabeths Hospital. An order was entered directing (R. 20) that petitioner be released unless civil commitment proceedings were instituted within ten days of the date of the order or such extension as the court might grant for cause shown, in which event petitioner was to remain in respondent's custody until final determination of the civil commitment proceedings.

3. Respondent appealed, and the United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, reversed.[4] The majority of six judges (Bastian, Miller, Prettyman, Washington, Danaher and Burger, J.J.) held that it was discretionary with the trial judge to permit petitioner to substitute pleas of guilty for his original pleas of not guilty (R. 33–34); that such discretion was not abused in this case (R. 36); that mandatory commitment was proper even in the case of nonviolent crimes (R. 37); and that, once a person has been committed under Section 24–301(d) of the D.C. Code, the government should not thereafter be forced to prove his insanity as the price of continuing treatment since the person may establish his eligibility for release in habeas corpus proceedings (R. 38). With respect to factual questions raised by counsel in brief and argument as to what actually occurred in the trial court, the court of appeals noted that no reporter was present at the Municipal Court proceedings, but that this fact did

[4] Pending appeal, petitioner was conditionally released from St. Elizabeths Hospital (R. 35). On April 7, 1961, however, his conditional release was revoked (see Pet. Br. 8).

not in any way affect the jurisdiction of the Municipal Court to take the action challenged. The court of appeals concluded (R. 38): "A presumption of regularity attaches to the proceedings of a trial court in the absence of an appeal, and we are bound by that presumption, unless and until a showing has been made that the judgment is so defective as to be subject to collateral attack, under the rules applicable in *habeas corpus*."

In a dissenting opinion, Judge Fahy, with whom Judges Edgerton and Bazelon joined, did not reach the issue of the power of the Municipal Court to reject the guilty pleas, but thought that petitioner's commitment was invalid because the record did not show that he and his counsel were given a "reasonable opportunity" to cope with the testimony of the psychiatrist by showing that petitioner was not of unsound mind at the time of the commission of the offenses (R. 40). The dissenting judges also would have affirmed on the ground that, even if petitioner was validly committed, his continuing confinement was not authorized by statute (R. 41–44).

SUMMARY OF ARGUMENT

At issue in this case is the validity of the delicate balance struck by the Congress and the Court of Appeals for the District of Columbia Circuit, acting in their special spheres of responsibility as the legislature and the highest court of the District of Columbia, in the formulation and overseeing of the rules controlling criminal insanity in the District. The judgments of these bodies should be reviewed by this Court with great restraint. Only if their choices are

shown to be plainly invalid should the Court intervene. See *Fisher* v. *United States,* 328 U.S. 463, 476.

I

A. Rule 9 of the Municipal Court Criminal Rules, which is the exact replica of Rule 11 of the Federal Rules of Criminal Procedure, specifically provides that the court may refuse to accept a plea of guilty. Both the language of the Rule and its history refute petitioner's argument that the court's discretion to reject a guilty plea is limited to instances of a lack of voluntariness or understanding. Courts have long refused to accept a guilty plea when there is evidence that the defendant, notwithstanding his plea, is actually innocent. Evidence of a lack of capacity to commit the crime furnishes no exception.

B. The trial judge did not abuse his discretion in refusing to permit petitioner to plead guilty. The judge had before him substantial evidence that petitioner was of unsound mind at the time of the commission of the offenses. Acceptance of the guilty pleas would have resulted in the imposition of criminal punishment notwithstanding evidence that petitioner had not been responsible for his conduct. To overlook such evidence would have been to ignore the very basis of our criminal jurisprudence. "Our collective conscience does not allow punishment where it cannot impose blame." *Holloway* v. *United States,* 148 F. 2d 665 (C.A. D.C.).

C. Petitioner's contention that by refusing to accept his guilty pleas the trial court deprived him of the effective assistance of counsel does not merit serious consideration. A judge does not render coun-

sel's assistance ineffective, and thereby transgress the bounds of the Sixth Amendment, merely by rejecting the proposition which counsel tenders.

II

As *Davis* v. *United States*, 160 U.S. 469, indicates, the prosecution, as well as the defendant, may raise the question, and offer evidence, of insanity. The prosecutor cannot in good conscience prove the commission of criminal acts but withhold evidence of a lack of responsibility.

III

A. There is no warrant for the contention that Section 24–301(d) of the D.C. Code, which requires the commitment of "any person tried upon an indictment or information for an offense," who "is acquitted solely on the ground that he was insane at the time of its commission," applies only to defendants who affirmatively raise the insanity defense or who plead not guilty. The words of the statute do not support this construction; and it would be wholly inconsistent with the purposes of the mandatory commitment provision—the protection of the public and the rehabilitation of the defendant—to create exceptions where the defendant elects not to raise the insanity defense or chooses to plead guilty.

B. Petitioner's contention that Section 24–301(d) should be construed not to apply to defendants charged with nonviolent misdemeanors was not made in the habeas corpus petition, not presented to the court of appeals, not made in the petition for certio-

rari, and should not be considered here. The claim, moreover, lacks merit. Subsection (d) authorizes the commitment of "any person" tried for "an offense" and acquitted by reason of insanity. The fact that subsection (e) provides for certification of eligibility for release by the superintendent only upon a finding that the person confined "will not be dangerous" has no bearing upon the category of persons committable under subsection (d). The fact that one must be "not dangerous" in order to be released does not necessarily imply that one must be "dangerous" in order to be committed. In any event, the court of appeals has properly held a person who passes bad checks to be "dangerous" within the meaning of subsection (e).

IV

A. 1. Petitioner claims that Section 24–301(d) contravenes the due process clause of the Fifth Amendment because it does not provide for a special pre-commitment hearing or finding on the issue of insanity at the time of commitment. But commitment is for the purpose of treatment, not punishment, and consequently the formal procedural rules which must be followed in criminal trials are not necessarily applicable here. Even in the area of civil commitment, formal pre-commitment proceedings are not required in some jurisdictions and a majority of the courts have held that involuntary commitment without notice or opportunity to be heard does not violate due process provided that the patient has the right, after commitment, to contest in a judicial proceeding the propriety of his confinement.

2. Courts have held generally—and in modern times uniformly—that a defendant acquitted by reason of insanity is not deprived of his liberty without due process of law by commitment to a mental hospital without further hearing on the issue of his sanity at the time of the commitment, if he has means available for thereafter securing his release upon a showing that he has recovered his sanity. These holdings are consistent with this Court's view that the object of a writ of habeas corpus "is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment." *Ekiu* v. *United States,* 142 U.S. 651, 662.

3. The fact that in the District of Columbia a verdict of not guilty by reason of insanity must be returned where the trier of fact has no more than a reasonable doubt of the defendant's sanity does not render the defendant's commitment constitutionally invalid. Congress faced the problem that, if it imposed lax commitment standards, juries would be chary of acquitting defendants on the ground of insanity because of a reluctance to jeopardize the security of the citizens of the District of Columbia. The Congressional choice in this delicate area is not so irrational as to offend due process, particularly since the commitment standard parallels the standard for acquittal by reason of insanity.

In *Ragsdale* v. *Overholser,* 281 F. 2d 943 (C.A.D.C.), Section 24–301 was sustained as against the conten-

tion presented here. The court in that case pointed out that implicit in a verdict of not guilty by reason of insanity is the conclusion that the defendant committed the offense charged and that there is a rational basis for the belief that he suffered from a mental disorder of which the offense was a product; that Congress might well have concluded that a hearing immediately after the verdict to determine the defendant's then mental condition would be meaningless because psychiatrists would not have had a reasonable opportunity to subject him to observation and examination and to report their findings; that it is not unreasonable to refuse to permit the defendant to remain at large while psychiatrists were attempting to determine whether he was dangerous, since a premature release could lead to the commission of new criminal acts; and that the defendant may judicially test the legality of his confinement in habeas corpus proceedings.

4. In formulating procedures to be followed after a verdict of not guilty by reason of insanity, Congress is not constitutionally required to duplicate the procedures which are established for civil commitment. Those who have committed anti-social acts forbidden by law and have been found not guilty by reason of insanity constitute an "exceptional class of people" (*Overholser* v. *Leach*, 257 F. 2d 667, 669 (C.A.D.C.), certiorari denied, 359 U.S. 1013) who can be dealt with separately.

It is unnecessary, in order to sustain the constitutionality of Section 24–301, to presume from the verdict of not guilty by reason of insanity that the de-

fendant is insane at the time of the commitment. The only presumption which it is necessary to make from that verdict—embodying a finding of the commission of an act proscribed by law and some rational doubt of sanity—is that the defendant *may* still be dangerous, a perfectly permissible inference.

B. Insofar as petitioner attacks the release provisions of Section 24–301 as those provisions have been interpreted by the court of appeals, his contentions should not be considered. Petitioner has never claimed that he is eligible for release because he is of sound mind, but attacks his detention solely on the ground that his commitment was invalid. The issue, therefore, is the validity of his initial commitment—not of the standards governing eligibility for release. The commitment is defended, in part, upon the ground that habeas corpus is subsequently available. But if the general availability of habeas corpus proceedings with constitutionally sufficient safeguards would validate the commitment, it would be inappropriate, in advance of a specific habeas corpus proceeding testing the particular petitioner's eligibility for release, to invalidate a particular commitment upon the ground that in *other* cases the standards applied in release proceedings have not met constitutional requirements. This Court has rigidly adhered to the rule that it will never anticipate a question of constitutional law in advance of the necessity of deciding it or formulate a rule of constitutional law broader than is required by the facts to which it is to be applied.

C. 1. In any event, the release provisions of Section 24–301, as construed by the court of appeals, are con-

sistent with due process. The court of appeals has held that, in the absence of a certificate from the superintendent of the hospital in which a person committed under subsection (d) is confined that such person has recovered his sanity and will not be dangerous to himself or others (see subsection (e), App., *infra*, pp. 91-93), such person, in exercising his right to petition for a writ of habeas corpus under subsection (g), must show (1) that he has recovered his sanity and (2) that such recovery has reached the point where he has no abnormal mental condition which in the reasonably forseeable future would give rise to danger to himself or to the public in the event of release. This is a reasonable standard. The concept of "abnormal mental condition" allows for the fact that recovery from a behavior disorder does not come overnight, and that a patient may progress from what is indisputably a "mental disease" to a condition which cannot be so labeled but nevertheless exposes himself or others to danger. The test of legal responsibility for crime is not necessarily the proper test for determining whether commitment should continue; indeed, application of the responsibility test may lead to premature release.

2. The court of appeals has also ruled that the petitioner must show that the refusal of the superintendent to issue a certificate under subsection (e) is arbitrary and capricious, and has stated that "the doubt if reasonable doubt exists about danger to the public or the patient, cannot be resolved so as to risk danger to the public or the individual." *Ragsdale* v. *Overholser*, 281 F. 2d 943, 947.

There can be no constitutional barrier to placing such a burden on the patient to establish his eligibility for release. Release after acquittal by reason of insanity generally requires a stronger showing of restoration to sanity than would be appropriate in a noncriminal case, and the person confined in a mental institution pursuant to such an acquittal normally has the burden of proof on that issue. The fact that the burden of proof may be less favorable in the District of Columbia than in some other jurisdictions is not dispositive of the constitutional issue. In *Leland* v. *State of Oregon*, 343 U.S. 791, a capital case, the Court sustained, as against due process objections, an Oregon statute which, alone among state statutes, required the accused, on a plea of insanity, to establish that defense beyond a reasonable doubt.

3. Courts have long been aware that they assume a great responsibility in ordering the discharge of a person who, in the opinion of the superintendent of the institution to which the person has been committed, should not be at large for reasons of public safety. The hospital authorities who have the person under daily supervision and to whom his history and condition are most familiar are best qualified to exercise the major responsibility for discharging patients. Courts, moreover, are ill-equipped to make medical findings.

V

There were no other constitutional infirmities either in petitioner's trial or in his subsequent confinement.

A. The *amicus*, but not petitioner, urges that the proceedings in the Municipal Court were invalid because petitioner did not have counsel at arraignment. This issue, never presented to or passed upon below, should not be considered here. In any event, the argument is without merit since petitioner had counsel appointed before trial and was not prejudiced in any way by the absence of counsel at arraignment.

B. Petitioner's argument that he "had no formal notice that his hearing upon a criminal charge would be transformed into a hearing upon his sanity" (Pet. Br. 24) should not be considered because it was not presented to the district court in the habeas corpus petition. The contention also lacks merit, for there is nothing in the record to show that the hearing was transformed into an inquiry concerning petitioner's sanity at the time the checks were cashed. The judgment of acquittal by reason of insanity implies that the government offered evidence of, and proved beyond a reasonable doubt, the commission of acts forbidden by law. Thus, the question of insanity was but one of the issues at petitioner's criminal trial. There is nothing in the record to show that petitioner was surprised by the refusal of the trial judge to accept his plea of guilty, or by the fact that the physician was called to the stand, or by the testimony of the physician. The hospital report indicating that petitioner was of unsound mind was part of the record; prior decisions of the Court of Appeals for the District of Columbia Circuit suggested that the court might refuse to accept the guilty pleas; and there was precedent in the

Municipal Court for the refusal to accept the pleas. No claim of surprise was made, nor was a continuance requested.

C. Petitioner urges that the burden of proof at trial was inconsistent with due process requirements because, if he were to prevail in his desire to be convicted rather than acquitted, he would have had to establish his sanity beyond a reasonable doubt. This argument, however, is merely a restatement, in a different form, of the argument that it is unconstitutional to commit a defendant found not guilty by reason of insanity where the verdict implies only a reasonable doubt of the defendant's sanity. Moreover, since the record reflects that a single physician testified at the trial and that his testimony was to the effect that the crimes charged were the products of mental illness, whatever burden might be postulated as satisfying constitutional requirements was met here.

D. The claim that petitioner was entitled to the services of private psychiatrists at government expense was also not made below and for that reason should not be considered here. The record does not show that petitioner ever requested such relief at the trial. He received an impartial psychiatric examination by psychiatrists not beholden to the prosecution, but to the court. This Court and the lower federal courts have indicated in comparable circumstances that the defendant is not entitled to secure further psychiatric services or testimony at government expense. *Griffin* v. *Illinois*, 351 U.S. 12, cannot be read to require what petitioner demands, for otherwise he would be entitled to the services of any type

of expert whose services might be relevant. Neither the requirements of a fair trial, nor of equal protection, go so far.

E. Finally, petitioner claims that his involuntary confinement at St. Elizabeths Hospital is constitutionally justifiable only upon the assumption that he will receive treatment and rehabilitation, and without any proof asserts that conditions at St. Elizabeths are inadequate for this purpose. But the conditions at St. Elizabeths Hospital are not a proper subject for judicial notice and in any event inadequacies in treatment would be for Congress to rectify. The record contains uncontradicted evidence that petitioner has been receiving treatment.

ARGUMENT

INTRODUCTION

The determination made below, concurred in by six judges of the court of appeals, was upon a matter of peculiarly local concern, involving the procedure followed by the Municipal Court under the statutes and rules governing criminal insanity in the District of Columbia. With respect to local rules of law which the courts of the District of Columbia have fashioned, this Court's announced "policy is not to interfere * * *, save in exceptional situations where egregious error has been committed." *Fisher* v. *United States*, 328 U.S. 463, 476; *Griffin* v. *United States*, 336 U.S. 704, 717–18. In particular, this Court has for many years left to the United States Court of Appeals for the District of Columbia Circuit and to the Congress the formulation and overseeing of the rules controlling the defense of insanity in the District of Columbia.

In *Durham* v. *United States*, 214 F. 2d 862, 874–875 (C.A. D.C.), the court of appeals announced a new test of criminal responsibility to the effect that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." In the more than eighty opinions involving criminal insanity which the court has issued since the *Durham* case,* the court has developed a body of law—never disturbed by this Court—which delicately balances the rights and needs of the individual and the claims of the community. In this area the court below therefore has both familiarity with the local problem and special responsibility for its solution.

90-93

Furthermore, by the passage of Section 24–301 of the D.C. Code (App., *infra*, pp. [illegible]), Congress, acting in its special sphere of responsibility as the legislature of the District of Columbia (see *Griffin* v. *United States*, *supra*), made a judgment as to the disposition of persons who are relieved of criminal responsibility under the *Durham* rule. This legislative judgment necessarily involved the consideration of many interests, including the interest of the individual not to be held criminally responsible when he is not morally responsible and the interest of society in not punishing an individual upon whom it cannot assess blame.

The present proceeding jeopardizes the delicate balance struck by the court of appeals and by the Congress, and the judgments of these bodies therefore

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*See Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 Yale L. J. 905, 906 (1961).

should be reviewed by this Court with great restraint. Only if their choices are shown to be plainly invalid should the Court intervene.

I

THE TRIAL JUDGE PROPERLY REFUSED TO PERMIT PETITIONER TO PLEAD GUILTY

The record shows that petitioner originally entered pleas of not guilty to the informations (R. 19, 21, 25), and that he subsequently sought to change his pleas from not guilty to guilty (R. 19). Although we do not agree with all of petitioner's specific challenges to the original pleas of not guilty,[1] we do not stand on those pleas, because they were apparently entered

[1] Petitioner asserts that pleas of not guilty were entered "on behalf of petitioner, who was not then assisted by counsel" (Pet. Br. 5). The portions of the record cited by petitioner (R. 21, 25) simply show that the words "plea not guilty" were stamped upon the informations. The district court, in the *habeas corpus* action, specifically found that *petitioner* "initially entered a plea of not guilty and subsequently attempted to change *his* plea to one of guilty" (R. 19) (emphasis added). See also the statement of facts in the majority opinion of the court of appeals (R. 30). Rule 8 of the Municipal Court Criminal Rules provides that "[a]rraignment shall be conducted in open Court and shall consist of reading the information to the defendant or stating to him the substance of the charge *and calling upon him to plead thereto.*" (Emphasis added.) The presumption of regularity (*Darr* v. *Burford*, 339 U.S. 200, 218; *Johnson* v. *Zerbst*, 304 U.S. 458, 468) must govern in the absence of any evidence that Rule 8 was not complied with.

Petitioner also asserts that the pleas of not guilty were "entered for him without his authority" (Pet. Br. 5). The record contains no support for this statement; nor does petitioner cite anything in the record to support this allegation.

when petitioner was without a lawyer and, although he waived counsel (R. 21, 25), there is serious doubt that he was competent at the time. We shall argue the case as if the attempted pleas of guilty were the first ones sought to be entered by petitioner. On that basis, we urge that the trial judge had discretion to refuse to accept the pleas, and that he did not abuse his discretion in petitioner's case.

A. THE TRIAL JUDGE HAS DISCRETION ON WHETHER TO ACCEPT A PLEA OF GUILTY

The court of appeals properly held that the Municipal Court, in its sound discretion, may refuse to permit a defendant to plead guilty (R. 33).

1. Rule 9 of the Municipal Court Criminal Rules (App., *infra*, p. 93) provides that "[t]he Court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. * * *" On its face, the rule plainly vests the Municipal Court with discretion to reject a plea of guilty.

Petitioner contends that under Rule 9 the Municipal Court may refuse to accept a guilty plea only when in doubt as to whether "the plea is made voluntarily with understanding of the nature of the charge" (Pet. Br. 37). This construction does violence to the unambiguous language of the rule. Only the mandatory clause—"shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge"—contains any qualification; the permissive clause—"[t]he Court may refuse to accept a plea of guilty,"—is wholly unqualified. Moreover, to say

that the permissive clause authorizes no more than what is compelled by the mandatory clause renders the permissive clause superfluous and attributes two contradictory purposes to the rulemaking authority. If the court is required to reject a plea of guilty when it is not voluntarily made, it cannot also be given discretion to do so.

2. Rule 9 is an exact replica of Rule 11 of the Federal Rules of Criminal Procedure. The history of Rule 11 confirms that the draftsmen intended to confer upon the district courts discretion to reject pleas of guilty, and that this discretion was not intended to be limited only to those instances involving a lack of voluntariness or understanding.

In the early drafts of Rule 11, the Advisory Committee on Rules of Criminal Procedure, appointed by this Court, provided simply that "[t]he court may refuse to accept a plea of guilty or of nolo contendere," without including any mandatory provision compelling the court, before accepting a guilty plea, to determine that the plea was voluntarily and intelligently made. See Orfield, *Pleas in Federal Criminal Procedure*, 35 Notre Dame Law 1, 2 (1959). In the First Preliminary Draft (seventh committee draft) dated May, 1943, the first sentence attained its final form, *i.e.*, "[a] defendant may plead not guilty, guilty, or, with the consent of the court, nolo contendere." The draft provided in the second sentence that "[t]he Court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the indictment or information charges an offense and that the plea is made volun-

tarily with understanding of the nature of the charge." In the Second Preliminary draft (eighth committee draft), dated February, 1944, Rule 11 attained its final form. No changes were made in the Report of the Advisory Committee (ninth committee draft), dated June, 1944. See Orfield, *supra*, at 5. This Court adopted the rule without change. *Ibid.* Thus, it is clear that, from the inception of their work, the draftsmen of Rule 11 intended to vest the district courts with unqualified power to reject a plea of guilty, and that the mandatory clause was added in the later drafts only for the purpose of imposing a duty upon the courts in certain specific cases.

Further confirmation of the intent of the draftsmen is found in the notes of the Advisory Committee on the Rule as contained in the First and Second Preliminary drafts. As the Advisory Committee stated (emphasis added):

> * * * That a defendant may plead guilty, and that *the court may refuse* or delay *acceptance of the plea,* is in accordance with the common law as followed in the federal courts. See *Hallinger* v. *Davis,* 146 U.S. 314, 318 (1892); *United States* v. *Trinder,* 1 F. Supp. 659 (D. Mont. 1932). See also Blackstone, *Commentaries* (1769) * * * 329, 332; and 1 Chitty, *Criminal Law* (5th Am. ed. 1847) * * * 422, 434, 471.

The Committee, in stating that "the court may refuse * * * acceptance of the plea," used wholly unqualified language. That this wording was not inadvertent is confirmed by the citation to *United States* v. *Trinder,* 1 F. Supp. 659 (D. Mont.), for in the *Trinder* case

the district court refused to accept pleas of guilty on grounds other than a lack of voluntariness or understanding. The defendants, minor Indian wards, were indicted for stealing a government automobile. Two of the defendants pleaded guilty. It appeared, however, that they had taken the automobile for temporary use with intent to return it to the place of taking. Because an intent permanently to deprive the owner of his property was an element of the offense of larceny, the court concluded that the defendants were not guilty as charged, rejected the guilty pleas, and dismissed the case against them. The citation to the *Trinder* case is convincing evidence that the draftsmen of Rule 11 were aware that there may be circumstances, other than a lack of voluntariness or understanding, which justify a trial court in refusing to accept a plea of guilty.

3. The procedure adopted in the *Trinder* case, *supra,* is in accord with the procedure followed by other courts when it affirmatively appears that the defendant, notwithstanding his plea of guilty, was in fact not guilty of criminal conduct. In *United States* v. *Echols,* 253 Fed. 862 (S.D. Tex.), it appeared to the court upon inquiry of the defendant and of the government witnesses that the defendant had been entrapped by a government officer into committing the offense charged. The court thereupon refused to accept the defendant's plea of guilty and dismissed the case. See also *United States* v. *Bysozoski,* 144 F. Supp. 806 (D.N.J.); *State* v. *Hardy,* 339 Mo. 897, 98 S.W. 2d 593; *R.* v. *Rivett,* 34 Cr. App. R. 87, 91.

In many state cases, the courts have held it to be the duty of a trial court to *reject* a plea of guilty

when there is plain evidence of innocence.[8] Thus, in *Harshman* v. *State*, 232 Ind. 618, 115 N.E. 2d 501, the defendant pleaded guilty but indicated at the same time that he did not know whether he had committed the crime charged. The trial court accepted the plea of guilty. On appeal from the denial of a writ of error *coram nobis*, the Supreme Court of Indiana held that the guilty plea should have been rejected. The court declared (232 Ind. at 621, 115 N.E. 2d at 502) that (emphasis added):

> * * * No plea of guilty should be accepted when it appears to be doubtful whether it is being intelligently and understandingly made, *or when it appears that, for any reason, the plea is wholly inconsistent with the realities of the situation.*

English cases are to the same effect.[9] See also *Carter* v. *United States*, 350 U.S. 928.[10]

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[8] *People* v. *Morrison*, 348 Mich. 88, 81 N.W. 2d 667; *People* v. *Scofield*, 142 Mich. 221, 105 N.W. 610; *State* v. *Stacy*, 43 Wash. 2d 358, 261 P. 2d 400; *State* v. *Reali*, 26 N.J. 222, 139 A. 2d 300; *Commonwealth* v. *Cavanaugh*, 183 Pa. Super. 417, 133 A. 2d 288.

[9] *The King* v. *Ingelson*, 1 K.B. [1915] 512, 513.

[10] Petitioner cites no case in which the issue was whether the trial court properly could reject a guilty plea. In *Patton* v. *United States*, 281 U.S. 276, and *State* v. *Kaufman*, 51 Iowa 578, 2 N.W. 275, the sole question was whether, *with the consent of the government and the court*, the defendants could waive their constitutional right to trial by a jury of twelve persons. In *Kercheval* v. *United States*, 274 U.S. 220, 223, the narrow issue was whether a plea of guilty withdrawn by leave of court is admissible against the defendant on his trial arising on a substituted plea of not guilty. In *Pope* v. *State*, 56 Fla. 81, 47 So. 487, and *Canada* v. *State*, 144 Fla. 633, 198 So. 220, the issue was the right of the defendant to withdraw a

With respect to the precise issue before the trial judge in the present case, it has been held in several cases that it is proper for the judge to refuse to accept a plea of guilty where it appears from evidence that the accused was of unsound mind at the time of the commission of the offense.

For example, in Texas, a hearing is conducted in capital cases even after a plea of guilty is entered to enable the jury to assess the punishment. Where the evidence introduced at that hearing tends to show that the accused was insane at the time of the commission of the offense, the Texas courts have held that, where the defendant refuses to withdraw the plea of guilty, the trial court may itself withdraw the plea and enter a plea of not guilty in the defendant's behalf.[11] This rule has been applied in trials for non-

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plea of guilty previously entered. In *Williams* v. *State*, 89 Okla. Cr. 95, 129, 205 P. 2d 524, 542, the question was whether the court properly *accepted* the plea of guilty. In *West* v. *Gammon*, 98 Fed. 426 (C.A. 6), the court held only that it was not a violation of the defendant's right of trial by jury for the court to pass sentence upon his plea of guilty. And in *Opinion of Justices*, 9 Allen 585 (Mass.), the court held only that, under Massachusetts law, the court was empowered to *accept* a plea of guilty to a charge of murder in the first degree. Dicta to the effect that a defendant has the "right" to plead guilty, uttered in cases involving the efforts of a defendant to avoid his improvident action in entering a guilty plea, are not persuasive. See *State* v. *Hardy*, 339 Mo. 897, 901, 98 S.W. 2d 593, 595, distinguishing *Pope* v. *State*, *supra*. Statements to the effect that a plea of guilty "is itself a conviction" presuppose acceptance and entry of the plea by the court.

[11] *Edwards* v. *State*, 134 Tex. Cr. 153, 114 S.W. 2d 572; *Thompson* v. *State*, 127 Tex. Cr. 494, 77 S.W. 2d 538; *Harris* v. *State*, 76 Tex. Cr. 126, 172 S.W. 975.

capital and nonviolent offenses as well as in capital cases where evidence of insanity at the time of the offense appears."[13]

At least one English case is in accord.[14] In *R.* v. *Rivett,* 34 Cr. App. R. 87, counsel for the prosecution informed the trial judge that there was a question as to the prisoner's fitness to plead.[14] A jury, sworn to try the issue, determined that he was fit to plead notwithstanding the evidence of two medical men to the contrary. The prisoner pleaded guilty, but the judge directed a plea of not guilty to be entered. The Court of Criminal Appeals declared that this action was "well warranted" (*id.* at 91).

4. On the basis of the language of Rule 9, the history of Rule 11, F.R. Crim. P. (the federal counterpart of Rule 9), and the case law, it is clear that a trial judge has discretion under Rule 9 to refuse to accept a plea of guilty. As the court of appeals declared in *Tomlinson* v. *United States,* 93 F. 2d 652, 654 (C.A. D.C.), certiorari denied, 303 U.S. 646: "An application by a defendant to change his plea [or, as we have shown, an attempt to enter a plea of guilty in the first place] is addressed to the sound discretion of the court, and the action of the court will not

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[13] *Yantis* v. *State,* 95 Tex. Cr. 541, 255 S.W. 180 (automobile theft).

[14] We have not made a thorough search of the English cases.

[14] The Court of Criminal Appeal described this procedure as "a perfectly correct course for the prosecution to take" (34 Cr. App. R. at 90).

be disturbed, unless there has been an abuse of that discretion." [15]

B. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN REFUSING TO PERMIT PETITIONER TO ENTER PLEAS OF GUILTY

The court of appeals properly held that the trial judge did not abuse his discretion in refusing to allow petitioner to enter pleas of guilty.

Petitioner tendered pleas of guilty to two offenses alleged to have been committed on October 20, 1959 and October 21, 1959 (R. 22, 26). When the guilty pleas were tendered, the trial judge had before him two reports submitted by the Assistant Chief Psychiatrist of the D.C. General Hospital, which were attached to one of the informations (R. 23, 24). The first report, dated December 4, 1959 (R. 23), declared that psychiatric examination had revealed petitioner "to be of unsound mind, unable to adequately understand the charges and incapable of assisting counsel in his own defense," and recommended that petitioner be committed to a psychiatric hospital for further care and treatment. The second report, dated December 28, 1959 (R. 24), after stating that petitioner had "shown some improvement and at this time appears able to understand the charges against him, and to assist counsel in his own defense," went on to say that, in the opinion of the author, petitioner "was suffering from a mental disease, *i.e.*, a manic depressive psychosis, at the time of the crime charged," and

[15] Accord, *Mats* v. *People*, 133 Colo. 45, 291 P. 2d 1059; *People* v. *Banning*, 329 Mich. 1, 44 N.W. 2d 841; *Gardner* v. *State*, 140 Tex. Cr. 227, 144 S.W. 2d 284; see 4 Wharton, *Criminal Law and Procedure* § 1911.

that "[s]uch an illness would particularly affect his judgment in regard to financial matters, so that the crime charged would be a product of this mental disease." The second report stated further that petitioner appeared "to be in an early stage of recovery from manic depressive psychosis. It is thus possible that he may have further lapses of judgment in the near future. It would be advisable for him to have a period of further treatment in a psychiatric hospital."

Not only was the trial judge aware of the fact that petitioner had been found, by the psychiatrist to whose supervision and observation petitioner had been committed, to be of unsound mind as of the time of the first report—dated approximately 45 days subsequent to the alleged offenses—but also the judge had a specific and unequivocal opinion from the same psychiatrist, in a report dated approximately nine weeks after the alleged offenses, that petitioner was of unsound mind at the time of those offenses, and that the offenses were the product of the mental illness.[16] In these circumstances, the trial court properly concluded that criminal punishment should not be imposed without further inquiry into the question whether petitioner was criminally responsible for his acts.

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[16] Petitioner concedes (Pet. Br. 56) that the court of appeals has "appropriately ruled that public psychiatric authorities, conducting a mental examination to inquire into the competency of a defendant to stand trial, pursuant to D.C. Code Ann. § 24–301(a), must extend the scope of the examination, upon request of either the Government or defense, to include the defendant's mental state as of the time of the alleged crime. See *Winn* v. *United States*, 270 F. 2d 326 (D.C. Cir. 1959); *Calloway* v. *United States*, 270 F. 2d 334 (D.C. Cir. 1959)."

Acceptance of the guilty pleas would have resulted in the imposition of criminal punishment notwithstanding clear evidence that petitioner was not responsible for his conduct. A trial judge could properly conclude that to overlook such evidence would be to ignore the very basis of our criminal jurisprudence, for "[o]ur collective conscience does not allow punishment where it cannot impose blame" (*Holloway* v. *United States*, 148 F. 2d 665, 666–667 (C.A. D.C.)), certiorari denied, 334 U.S. 852.[11] To accept the pleas of guilty would have been to brand with a criminal record one who, as the court of appeals noted, had never before been convicted of a criminal offense and had served honorably as a commissioned officer in the armed forces (R. 36). Whatever may be the wish of the defendant or his counsel,

[11] The District of Columbia Circuit, in promulgating the *Durham* rule, stated (214 F. 2d 862, 876): "The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called *mens rea*), commit acts which violate the law, shall be criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of a mental disease or defect * * * moral blame shall not attach, and hence there will not be criminal responsibility." See also, *Douglas* v. *United States*, 239 F. 2d 52, 59, 60 (C.A. D.C.); *Williams* v. *United States*, 250 F. 2d 19, 25 (C.A. D.C.). This concept has ancient roots. In the *Trial of Edward Arnold*, 16 Howell, State Trials 695, 764, it was stated: "If he was under the visitation of God, and could not distinguish between good and evil and did not know what he did, though he committed the greatest offence, yet he could not be guilty of any offence against any law whatsoever, for guilt arises from the mind, and the wicked will and intention of the man. If a man be deprived of his reason, and consequently of his intention, he cannot be guilty * * *."

neither can force the court to affix criminal liability where the court knows there is none. For the fixing of criminal responsibility is not merely a matter of fairness to the accused. The integrity of criminal justice is put in doubt whenever a judgment of guilt is passed and sentence is imposed upon an innocent man even though it be done at his own wish. Cf. *Hopt* v. *Utah*, 110 U.S. 574, 579.

Beyond this, the trial judge could reasonably pay some attention to "society's great interest" in securing the community against repetition of petitioner's anti-social conduct [18] and in rehabilitating and restoring him to usefulness in the community.[19] Under such circumstances, petitioner did not have an absolute right to waive trial, *Hopt* case, *ibid.*, and the judge did not abuse his discretion in refusing to permit him to enter pleas of guilty.[20]

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[18] See *Williams* v. *United States*, 250 F. 2d 19, 26 (C.A. D.C.); *Winn* v. *United States*, 270 F. 2d 326, 327 (C.A.D.C.), certiorari denied, 365 U.S. 848.

[19] The existence of the possibilities of civil commitment did not relieve the trial judge of his obligation to protect the interests of the community and of the petitioner (see R. 34). In *Carter* v. *United States*, 283 F. 2d 200, 208 (C.A. D.C.), the court declared that the existence of other possibilities, including civil commitment, "does not relieve the bench and bar of the responsibility of endeavoring to reach at the earliest possible stage—ideally, prior to trial and sentence—the approach to a particular case which appears most just and appropriate, having regard to the individual's mental condition, his history, and the possibility of rehabilitating and restoring him to usefulness in the community."

[20] Since an indication of insanity at the time of the offense is a "fair and just" reason (*Kercheval* v. *United States*, 274 U.S. 220, 224) for granting a defendant's motion for leave to withdraw a plea of guilty prior to impositon of sentence (*Gearhart* v. *United States*, 272 F. 2d 499 (C.A.D.C.)), it

C. THE TRIAL COURT'S REFUSAL TO ACCEPT THE PLEAS OF GUILTY DID NOT DEPRIVE PETITIONER OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner also argues that, by refusing to accept his pleas of guilty, the trial court deprived him of the effective assistance of counsel (Pet. Br. 40–44). Petitioner's argument is based on the theory that his counsel advised him to plead guilty. But the mere fact that the petitioner was advised by his lawyer to enter guilty pleas did not convert the court's otherwise proper ruling into a deprivation of effective assistance of counsel in the constitutional sense. A lawyer may advise his client to pursue many courses of action which may be unacceptable to the court, such as to plead nolo contendere, to introduce incompetent evidence, to secure release from prison pending trial on a homicide upon the client's own recognisance. Such advice is ineffective only in the sense that it is unsuccessful. But unless it can be said that half the litigants in the courts are ineffectively represented, unsuccessful representation cannot be equated with ineffective representation.[21] A judge does not render counsel's assistance ineffective merely by rejecting the proposition he tenders. Similarly, "[a] claim of denial of due process can hardly be predicated upon the failure of a defense move." *United States ex rel. Smith* v. *Baldi*, 344 U.S. 561, 568. It is not the court's refusal to permit the con-

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follows that evidence of insanity is a "fair and just" reason for refusing to permit a plea of guilty in the first place.

[21] Circuit Judge (later Mr. Justice) Minton said: "We know that some good lawyer gets beat in every law suit." *United States ex rel. Weber* v. *Ragen*, 176 F. 2d 579, 586 (C.A. 7), certiorari dismissed, 338 U.S. 809.

summation of a lawyer's advice to forego an insanity defense, but the inadequacy of the advice itself, which gives rise to questions of ineffective assistance of counsel."

II

INSANITY IS NOT SIMPLY AN AFFIRMATIVE DEFENSE TO BE RAISED SOLELY BY THE DEFENDANT; THE ISSUE MAY ALSO BE RAISED BY THE PROSECUTION OR BY THE COURT ITSELF

In stating that "insanity is not strictly an affirmative defense and can be raised by either the court or the prosecution" (R. 34), the court below was merely adhering to the rule prevailing in the federal courts, which this Court formulated in *Davis* v. *United States*, 160 U.S. 469. In the *Davis* case, the Court took the view that, not only could the question of insanity be raised by the prosecution, but also that proof on the issue could be adduced by either side. The Court quoted from *Cunningham* v. *State*, 56 Miss. 269, to the effect that (160 U.S. at 491 (emphasis added)):

> • • • *whenever the condition of the prisoner's mind is put in issue by such facts proved on either side* as create a reasonable doubt of his sanity, it devolves upon the State to remove it and to establish the sanity of the prisoner to

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"In fact, the court of appeals has held that the efforts of defense counsel to remove the issue of insanity from the case constitutes error (*Tatum* v. *United States*, 190 F. 2d 612 (C.A. D.C.); *Clark* v. *United States*, 239 F. 2d 184 (C.A. D.C.)), and has indicated that the failure of defense counsel to raise the defense of insanity constitutes ineffective assistance of counsel and thus ground for a motion to vacate sentence under 28 U.S.C. 2255 (*Plummer* v. *United States*, 230 F. 2d 729, 730 (C.A. D.C.)).

> the satisfaction of the jury beyond all reasonable doubt arising out of all the evidence in the case.

See also 160 U.S. at 493, and the Court's quotation (*id.* at 490) from *State* v. *Bartlett*, 43 N.H. 224, 231. The Court further stated (160 U.S. at 487–488 (emphasis added)):

> Giving to the prosecution, where the defence is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict, is whether upon all the evidence, ***by whatever side adduced,*** guilt is established beyond reasonable doubt.

See *United States* v. *Strickland*, Crim. No. 374–59 (D.D.C.) (unreported), discussed in Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on *Constitutional Rights of the Mentally Ill*, 87th Cong., 1st Sess., 708–709 (1961).

The English authorities which petitioner cites (Pet. Br. 35–37; see also ACLU Br. 49) are hardly persuasive in light of the contrary view expressed by this Court. In any event, the English law is by no means clear. As authority for the statement that "the issue of insanity at the time of the offense may not be raised either by the Judge or by the prosecution, but only by the defense," petitioner cites Royal Commission on Capital Punishment, Report, § 443 (1953); Williams, *Criminal Law: The General Part*, § 93 (London 1953); and *Rex* v. *Oliver*, 6 Cr. App. 19, 20 (1910). But the language employed by the court in *Rex* v. *Oliver*, *supra* (cited in the Report of the Royal

Commission and in the book of Dr. Williams) was uttered in a case in which insanity had been raised as a defense by the defendant, and the case presented only the question of the proper procedure to be followed by the prosecution under those circumstances. As the report of the case concluded (6 Cr. App. at 21 (emphasis added)): "The court stated that the only general rule that could be laid down was that insanity, *if relied upon as a defence,* must be established by the defendant." Thus the case is authority only for the procedure to be followed where the issue of insanity has been raised by the defense. See Samuels, *Can the Prosecution allege that the Accused is Insane?* [1960] Crim. L. Rev. 453–54, 459–60. In this context the rule may be viewed simply as a regulation governing the manner of proof.

The English rule may well be different where insanity is not raised as a defense. In *Rex* v. *Bastian*, 42 Cr. App. 75, a prosecution for murder, the court ruled that "the defence having put in issue the state of the prisoner's mind by raising a defence of diminished responsibility, the court could not stop the prosecution from cross-examining witnesses called for the defence and calling evidence in rebuttal with a view to establishing insanity, and inviting the jury to return a verdict of Guilty but insane."[*] See also

[*] Commenting on the *Bastian* case, Professor J. C. Smith has stated that "* * * the decision is a realistic one for a verdict of manslaughter on the ground of diminished responsibility will often be preferable, from the prisoner's point of view, to one of guilty but insane, when the result may be that the prisoner may be detained in Broadmoor for life. This latter result may well be in the public interest, and therefore, it is submitted, it is right that the Crown should be allowed to seek to achieve it." *Case and Comment* [1958] Crim. L. R. 382, 392.

Regina v. *Kemp* [1956] 3 W.L.R. 724, 729; cf. *Rex* v. *Nott*, 43 Cr. App. R. 8.

Moreover, the Report of the Royal Commission noted that in Scotland "[e]vidence of insanity at the time of the offence (or of diminished responsibility) is ordinarily led by the defence but it would be open to the Crown to raise the issue if the defence did not do so." Report, *supra*, § 444.[24] In South Africa, too, the Crown is permitted to introduce evidence of insanity. Williams, *supra*, p. 311, n. 1. And in Canada, where the defendant pleads intoxication as a defense but denies insanity, the judge may, in spite of the denial, instruct the jury on the issue of insanity. *Rex* v. *Garrigan*, 4 D.L.R. [1937] 344.[25]

Accordingly, under the circumstances of the present case, it would have been perfectly proper for the insanity issue to be raised by the prosecution, for the prosecution should not, in good conscience, prove the commission of an act forbidden by law, but withhold

[24] The Commission declared that (*ibid.*) "[t]here is no case on record in which a prisoner who was believed to have been insane at the time of the act refused to let this special defence be put forward, but it is thought that, if this occurred, the Crown would call evidence of his mental condition, since it is the duty of the Crown to put all relevant evidence before the court."

[25] Dr. Glanville Williams, a noted British authority on criminal law, concludes that "[t]ruth should not be shut out merely because it is detrimental to the accused person, if it is neither irrelevant nor unduly misleading." Recognizing that "the lunatic can still be certified in the ordinary way," he nevertheless states that "it would seem preferable that the prosecution or the judge should be entitled to bring in the whole evidence on the criminal charge." Williams, *supra*, p. 313.

evidence of the defendant's lack of responsibility. As this Court stated in *Berger* v. *United States*, 295 U.S. 78, 88:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose * * * interest in a * * * criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

If the government may not conceal evidence tending to show that a defendant acted in self-defense, then surely it should have the right and the duty to introduce evidence tending to show his freedom from responsibility. The obligation of the government is not to indulge in a complicated legal game, but to bring the truth before the court.[28] Thus, the court of appeals was correct when, citing the *Berger* case, it agreed with the government that "it does not matter whether the psychiatrist was called by the court or by the Government; in either case, he was properly called" (R. 30).

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[28] See also *Edmonds* v. *United States*, 260 F. 2d 474, 478 (C.A. D.C.), certiorari denied, 362 U.S. 977; Statement of Oliver Gasch, in Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, *supra*, 87th Cong., 1st Sess., pp. 584–587; Samuels, *supra*, p. 458.

III

PETITIONER'S COMMITMENT WAS AUTHORIZED BY STATUTE

A. THE PROVISIONS OF THE MANDATORY COMMITMENT STATUTE REQUIRE THE COMMITMENT OF ALL DEFENDANTS FOUND NOT GUILTY BY REASON OF INSANITY, WHETHER OR NOT THEY THEMSELVES RAISED THE INSANITY DEFENSE OR DESIRED TO PLEAD GUILTY

There is no warrant for petitioner's contention (Pet. Br. 53–54) that Section 24–301(d) of the D.C. Code (App., *infra*, p. 9[illegible]), which requires the commitment of "any person tried upon an indictment or information for an offense," who "is acquitted solely on the ground that he was insane at the time of its commission", applies only to defendants who affirmatively raise the insanity defense. Nor is there any basis for the contention that the statute does not apply where the defendant wishes to plead guilty (ACLU Br. 50–53). The assumption underlying these arguments is that the sole, or the primary, congressional purpose in enacting the statute was to set the stage for an election by the defendant between imprisonment and hospitalization. The words of the statute neither expressly nor impliedly indicate any such purpose. Nor does the legislative history support the suggested construction.

Prior to *Durham* v. *United States*, 214 F. 2d 862 (C.A. D.C.), commitment of a defendant acquitted by reason of insanity in the District of Columbia courts was discretionary with the trial judge and the

Secretary of Health, Education, and Welfare," although it was customary for such persons to be committed as a matter of routine." The fear that the *Durham* rule would result in a flood of acquittals and that the acquitted defendants would be immediately turned loose stimulated agitation for new legislation. Krash, *supra*, p. 941.

In 1955, Congress enacted the present statute, making hospitalization mandatory in every case tried in the District of Columbia where a defendant is found not guilty by reason of insanity. "The primary legislative purpose was protection of the public safety." The statute was designed "to guard against imminent recurrence of some criminal act" by a person acquitted on the ground of insanity who might not be deterred by punitive sanctions." The Committee on Mental Disorder As a Criminal Defense, whose recommendations formed the basis for the legislation, de-

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" In 1954, the District of Columbia Code provided in pertinent part that "if an accused person shall be acquitted by the jury solely on the ground of insanity, the court may certify the fact to the [Secretary of the Department of Health, Education, and Welfare], who may order such person to be confined in the hospital for the insane * * *." D.C. Code § 24–301 (1951). See Committee On Mental Disorder As A Criminal Defense, *Report To The Council On Law Enforcement Of The District of Columbia*, in S. Rep. No. 1170, 84th Cong., 1st Sess., p. 18. Compare 24 U.S.C. 211.

" Krash, *supra*, 70 Yale L.J. at 941; S. Rep. No. 1170, *supra*, pp. 5, 12–13.

" Krash, *supra*, 70 Yale L.J. at 942.

" *Ibid.*

clared that "the public is entitled to know that, *in every case* [emphasis added] where a person has committed a crime as a result of a mental disease or defect, such person *shall* be given a period of hospitalization and treatment to guard against immiment recurrence of some criminal act by that person." S. Rep. No. 1170, 84th Cong., 1st Sess., p. 13. Both the House and the Senate committees stated that the bill amended existing law so as "[t]o provide that in *every case* where an accused is found not guilty of a crime solely by reason of insanity he shall be confined in a hospital for the mentally ill. *This is designed to protect the public* against the immediate unconditional release of accused persons who have been found not responsible for a crime solely by reason of insanity." H. Rep. No. 892, 84th Cong., 1st Sess., p. 3; S. Rep. No. 1170, *supra*, p. 3 (emphasis added). The mandatory commitment provision was also intended to protect the defendant and to provide a place and a procedure to rehabilitate and restore persons "as to whom the standards of our society and the rules of law do not permit punishment or accountability." *Ragsdale* v. *Overholser*, 281 F. 2d 943, 947 (C.A. D.C.).

In light of these purposes, the statutory scheme would be ill served by creating an exception in the case of a defendant who does not plead insanity, but who nevertheless is not responsible for his offense. Nor would it be consistent with the congressional purpose

to construe the statute as not applying where the defendant attempts to plead guilty.[21]

B. THE PROVISIONS OF THE MANDATORY COMMITMENT STATUTE APPLY TO ALL DEFENDANTS CHARGED WITH CRIME AND ACQUITTED ON THE GROUND OF INSANITY; NO EXCEPTION IS MADE FOR DEFENDANTS CHARGED WITH NONVIOLENT MISDEMEANORS

1. *Petitioner is barred from raising the issue here.*—Both petitioner (Pet. Br. 54) and the ACLU (ACLU Br. 54–56) argue here for the first time that the mandatory commitment statute should be construed as not applying to defendants charged with nonviolent misdemeanors. This claim was neither

[21] In the *amicus curiae* brief of the American Civil Liberties Union (p. 51), it is suggested that "the Government can hardly take the position that the statute should be read literally, since the consequence would be that there could be no commitment without an affirmative finding of insanity, as opposed to a reasonable doubt as to mental disease or defect." Apparently, the ACLU suggests that, read literally, Section 24–301(d), which provides for mandatory commitment of a defendant "acquitted solely on the ground that he was insane" at the time of the offense, applies only where the jury has made an affirmative special finding of proven insanity at the time of the commission of the offense. But Congress, well aware of existing practice in the District of Columbia (see *Tatum* v. *United States*, 190 F. 2d 612 (C.A. D.C.); *Durham* v. *United States*, 214 F. 2d 862 (C.A. D.C.)), used the words "acquitted solely on the ground that he was insane" to mean "found not guilty by reason of insanity," which of course means not guilty because there was a reasonable doubt as to the accused's sanity. There is a substantial difference between reading a statute literally where the result would be absurd (as in the example suggested by the ACLU) and reading a statute literally where the result would be wholly consistent with the purpose of Congress.

made in the habeas corpus petition (see R. 3–6) nor presented to the court of appeals (see R. 41), nor urged as a ground for review in the petition for certiorari. For each of these reasons, the claim should not be considered by this Court. See *Lawn* v. *United States*, 355 U.S. 339, 362–3, n. 16; *Duignan* v. *United States*, 274 U.S. 195, 200; Rule 23(1)(c) of the Revised Rules of this Court.

2. *There is no merit to the claim.*—Even if the claim were properly before this Court, it would have no merit. Petitioner and the ACLU rely upon language of Judge Fahy, dissenting below, who concluded that, even if petitioner's trial and commitment were valid, his detention "would no longer be sustainable on the basis of that commitment" (R. 41); that "[s]ection 301(d)—the mandatory commitment provision—and section 301(e)—governing subsequent release—are part of a general plan and are to be read in relationship of one with the other" (R. 41); and that continued restraint of a person committed under subsection (d) was conditioned upon the existence of the "dangerousness" referred to in subsection (e) (R. 42).[22] Judge Fahy further stated (R. 43):

> * * * Congress in section 301(e) is not concerned with persons who have engaged in any

[22] For this view of the statute, see also *Ragsdale* v. *Overholser*, 281 F. 2d 943, 949–50 (concurring opinion); *Overholser* v. *Russell*, 283 F. 2d 195, 198–99 (concurring opinion); *Overholser* v. *O'Beirne*, C.A.D.C., Oct. 19, 1961, slip op., pp. 22–23 (dissenting opinion).

> kind of unlawful conduct, however minor, but only with persons who have engaged in unlawful conduct of a dangerous character. The language used conveys the idea of physical danger to persons and, perhaps, to property. I do not attempt to delineate precisely the boundaries fixed by the language used, but obviously they do not encompass any and every minor conflict with the law of which a person has been acquitted because of a doubt about his sanity. Had Congress intended such a broad coverage, it would have used broader language such as "likely to engage in unlawful conduct," rather than the narrow language of section 301(e), "dangerous to himself or others."

Judge Fahy concluded that the valid restraint of petitioner "depends upon a finding, never yet made, that he is of unsound mind [footnote omitted] and not upon meeting the conditions for release applicable to persons committed under section 301(d)" (R. 44).

We submit that this view is fallacious. In the present case the coverage of Section 24-301(e) (App., *infra*, pp. 92-93)—the release provision—is not in issue, because petitioner attacks only the validity of his initial commitment. He claims that his detention is illegal because the commitment was invalid, but makes no claim that, even if his commitment were valid, he nevertheless would be illegally detained at the present time. Under subsection (d), "any person" may be committed after he has been tried for "an offense" and

acquitted by reason of insanity. There is not the slightest indication in the subsection that the "offense" must be a "dangerous", much less a "violent", offense. The criteria for commitment are completely different from the criteria for release. Even subsection (e), the release provision, does not carry with it the implication that a person may be committed only for a "dangerous" offense. The subsection provides for a certification by the hospital when the "person will *not* in the reasonable future be dangerous to himself or others" (emphasis added), rather than when the person will *no longer* be dangerous. It does not follow from the fact that a person must not be dangerous in order to be released that he must be dangerous in order to be committed.

In any event, petitioner is "dangerous" within the meaning of subsection (e) if he is likely to repeat the conduct which resulted in his prosecution. In *Overholser* v. *Russell*, 283 F. 2d 195 (C.A. D.C.), the court of appeals concluded that a proclivity for writing bad checks was sufficient to make the appellant "dangerous" for purposes of determining his eligibility for release in a habeas corpus proceeding. The court stated that (283 F. 2d at 198):

> We think the danger to the public need not be possible physical violence or a crime of violence. It is enough if there is competent evidence that he may commit any criminal act, for any such act will injure others and will expose the person to arrest, trial and conviction. There is always the additional possible

> danger—not to be discounted even if remote—that a non-violent criminal act may expose the perpetrator to violent retaliatory acts by the victim of the crime.

Speaking of the comparable offense of theft, the court of appeals said in *Overholser* v. *O'Beirne*, decided Oct. 19, 1961, slip op., p. 19:

> * * * [T]o describe the theft of watches and jewelry as "non-dangerous" is to confuse danger with violence [footnote omitted]. Larceny is usually less violent that [*sic*] murder or assault, but in terms of public policy the purpose of the statute is the same as to both. Larceny, assault and murder are all dangerous; they are simply different areas of prohibited conduct. Hence unless we are to ignore the objectives and policies of the statute in question, the release provisions must apply in the same way and with the same force to larceny without violence as to a crime of violence until Congress speaks otherwise. Of course the Superintendent of St. Elizabeths might well take into account, in making his appraisal of potential danger, the quality of the patient's abnormal mental condition as well as the history of conduct. But as we pointed out in *Overholser* v. *Russell*, 108 U.S. App. D.C. 400, 283 F. 2d 195 (1960), a "bad check" passer at large endangers himself by exposure to additional violations and additional arrests, trials and confinements, to say nothing of the serious effect on the public of his predatory tendencies.

IV

THE STATUTE UNDER WHICH PETITIONER WAS COMMITTED IS CONSTITUTIONAL

A. EVEN THOUGH THE MANDATORY COMMITMENT PROVISION DOES NOT PROVIDE FOR A PRE-COMMITMENT HEARING OR FINDING ON THE ISSUE OF ACTUAL INSANITY AT THE TIME OF COMMITMENT, IT DOES NOT VIOLATE THE DUE PROCESS CLAUSE

1. ***The requirements of due process are not the same for proceedings resulting in punishment and those for commitment for care and treatment.***— "* * * [T]he requirements of due process frequently vary with the type of proceeding involved, *e.g.*, compare *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U.S. 126, 152, with *Interstate Commerce Comm'n.* v. *Louisville & N. R. Co.*, 227 U.S. 88, 91 * * *." *Hannah* v. *Larche*, 363 U.S. 420, 440. There is a difference—significant for due process purposes—between proceedings to determine whether punishment should be inflicted and proceedings to determine whether care and treatment should be administered, even though the latter proceedings may also result in confinement. Cf. *Pee* v. *United States*, 274 F. 2d 556 (C.A. D.C.), and cases cited; Kadish, *A Case Study In The Signification Of Procedural Due Process—Institutionalizing The Mentally Ill*, 9 W. Pol. Q. 93, 101 (1956).

The individual who is committed to a mental institution after a verdict of not guilty by reason of insanity is not a "prisoner"; nor is he under "sentence." *O'Beirne* v. *Overholser*, 287 F. 2d 133, 136 (C.A.D.C.). He is an "accused person confined to a hospital for the mentally ill." D.C. Code § 24–301(b) (App., *infra*, p. 91); *O'Beirne* v. *Overholser*

supra. Commitment in no sense partakes of punishment. "Nothing in the history of the statute—and nothing in its language—indicates that an individual committed to a mental hospital after acquittal of a crime by reason of insanity is other than a patient. The individual is confined in the hospital for the purpose of treatment, not punishment; and the length of confinement is governed solely by consideration of his condition and the public safety." *Hough* v. *United States*, 271 F. 2d 456, 462 (C.A.D.C.); accord, *Overholser* v. *O'Beirne*, *supra*, slip op., pp. 4, 15. Accordingly, the procedures which would be constitutionally indispensable in a criminal trial are not constitutionally required in mandatory commitment proceedings.

The significance of the distinction between punishment and treatment is reflected in the procedures employed in the area of civil commitment. The law of England and the Commonwealth countries has long been marked by the absence of mandatory requirements of notice and hearing in pre-commitment procedures." A trend toward less formal procedures h

" See Kadish, *supra*, 9 W. Pol. Q. at 105–106. In England, an order of a justice based on a petition by a relative or friend and two medical certificates suffices to compel institutionalization, with no requirement of notice or hearing. Lunacy Act, 1890, 53–54 Vict., c. 5, Sec. 4 (1890) as amended, National Health Service Act, 1946, 9–10 Geo. 6, c. 81, Schedule 9 (1946); see Kadish, *supra*, 9 W. Pol. Q. at 106. The English law resulted from the recommendations of select committees which had examined the problem of committing the mentally ill. *Id.* at 107. Two full-scale investigations of the possible peril to personal liberties in the enforcement of the English commitment laws—by a Select Committee of the House of Commons in 1877, and by a Royal Commission in 1924—failed to convince the investigators of the existence of serious abuse or the need for major changes in the laws. Kadish, *supra*, 9 W. Pol. Q. at 108.

also been noted in this country.[34] In the United States, a majority of the judicial decisions on the issue have held involuntary commitment of mental patients without notice or opportunity to be heard not violative of due process where the patient has the right, after commitment, to contest in a judicial proceeding the propriety of his confinement either by way of a statutory post-commitment hearing or by way of habeas corpus.[35] Federal courts have refused to disturb such commitments.[36]

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[34] See Kadish, *supra*, 9 W. Pol. Q. at 109.

[35] See *Hammon* v. *Hill*, 228 Fed. 909 (W.D. Pa.); *Payne* v. *Arkebauer*, 190 Ark. 614, 80 S.W. 2d 76; *Hiatt* v. *Soucek*, 240 Iowa 300, 36 N.W. 2d 432; *In re Bryant*, 214 La. 573, 38 So. 2d 245; *McMahon* v. *Mead*, 30 S.D. 515, 139 N.W. 122; *In re Le Donne*, 173 Mass. 550, 54 N.E. 244; *In re Mast*, 217 Ind. 28, 25 N.E. 2d 1003; *In re Dowdell*, 169 Mass. 387, 47 N.E. 1033; *In re Crosswell*, 28 R.I. 137, 66 Atl. 55. *Contra*, *Barry* v. *Hall*, 98 F. 2d 222 (C.A. D.C.); *State ex rel. Fuller* v. *Mullinax*, 364 Mo. 858, 269 S.W. 2d 72; *In re Lambert*, 134 Cal. 626, 66 Pac. 851; *Appeal of Sleeper*, 147 Me. 302, 87 A. 2d 115; *People ex rel. Sullivan* v. *Wendel*, 33 Misc. 496, 68 N.Y.S. 948. In *In re Wellman*, 3 Kan. App. 100, 45 Pac. 726, the court invalidated commitment proceedings in which the alleged insane person was confined in prison without explanation during the proceeding and no post-commitment safeguards apparently existed. In *State* v. *Billings*, 55 Minn. 467, 57 N.W. 206, the court struck down a commitment procedure which did not provide for notice or hearing, but no post-commitment safeguards were in evidence or discussed. Although there is dictum in *Simon* v. *Craft*, 182 U.S. 427, 436, 437, indicating that due process may require notice and "opportunity to defend" in lunacy proceedings, the Court's holding was only that it was necessary to conclude on the basis of the record that notice and opportunity to defend were

Footnote 36 on page 52.

The distinction between proceedings to determine whether punishment should be inflicted and proceedings to determine whether civil confinement for care and treatment should be imposed applies *a fortiori* where the need for prompt confinement pending observation is far more compelling than in the civil commitment case, *i.e.*, where, as here, the individual involved has been found to have committed antisocial acts, and may very well continue his harmful conduct unless treated.

2. *A pre-commitment hearing after a verdict of acquittal by reason of insanity is not an essential element of due process.*—It should be made clear, at the outset, that implicit in a determination of not guilty by reason of insanity is the finding that the defendant actually committed the acts with which he was charged. The Court of Appeals for the District of Columbia Circuit made this plain in *Ragsdale* v. *Overholser*, 281 F. 2d 943 (discussed *infra*, at pp. 56–58)

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actually granted. The Court did not discuss the issue of whether the availability of a judicial proceeding to test the legality of confinement validates a pre-commitment proceeding without notice or hearing. See generally Freund, *The Police Power, Public Policy and Constitutional Rights*, § 255 (1904); Kadish, *supra*, 9 W. Pol. Q. at 110–112; Lindman and McIntyre, *The Mentally Disabled And The Law*, 25, 26 (1961); Ross, *Commitment Of The Mentally Ill: Problems of Law and Policy*, 57 Mich. L. Rev. 945, 976–978 (1959).

[28] See *Hammon* v. *Hill*, *supra*; *Hall* v. *Verdel*, 40 F. Supp. 941, 946 (W.D. Va.); *Shapley* v. *Cohoon*, 258 Fed. 752, 755 (D. Mass.).

and it is on this basis that the mandatory commitment procedure operates.

As early as *Hadfield's* case, decided in 1800, it was recognized that judges had power to order one acquitted by reason of insanity to be detained in custody as a dangerous person. *Trial of James Hadfield,* 27 Howell State Trials 1281, 1354–1356. See also *United States* v. *Lawrence,* No. 15,577, 26 Fed. Cas. 887, 891 (C.C. D.C.); Williams, *Criminal Law: The General Part,* § 89 (1953). Ever since then, the courts, acting pursuant to their inherent powers or under specific statutes, have ordered the confinement in mental hospitals of individuals found to be not criminally responsible because of their mental condition at the time of the perpetration of the criminal act. See *Overholser* v. *O'Beirne, supra,* slip op., p. 3. At present, criminal defendants who are acquitted on grounds of insanity are nearly always committed to mental institutions.[27]

Courts have generally—and in modern times uniformly—held that a defendant acquitted by reason of insanity is not denied due process by commitment to a mental hospital without further hearing on the issue of his sanity at the time of the commitment, provided there are means available for thereafter securing his release upon a showing that he has recov-

[27] See Comment, *Releasing Criminal Defendants Acquitted and Committed Because Of Insanity: The Need For Balanced Administration,* 68 Yale L. J. 293 (1958). Commitment is now covered by statute in almost all jurisdictions. *Id.* at 306–307. A detailed analysis of the state statutes appears in Lindman and McIntyre, *The Mentally Disabled And The Law,* 373–382 (1961).

ered his sanity.[25] These holdings are consistent with the view expressed by this Court that the object of a writ of habeas corpus "is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment." *Ekiu* v. *United States*, 142 U.S. 651, 652. This Court has also frequently indicated that due process normally requires no more than one opportunity to be heard, and if a full hearing is available at some stage of the proceeding, preliminary action need not meet any formal re-

[25] *Overholser* v. *O'Beirne*, *supra*, slip op., pp. 16, 17; *Foller* v. *Overholser*, 292 F. 2d 732, 733 (C.A.D.C.); *Curry* v. *Overholser*, 287 F. 2d 137, 139 (C.A.D.C.); *Ragsdale* v. *Overholser*, 281 F. 2d 943 (C.A.D.C.); *Orencia* v. *Overholser*, 163 F. 2d 763 (C.A.D.C.); *People ex rel. Peabody* v. *Chanler*, 133 App. Div. 159, 117 N.Y.S. 822, affirmed, 196 N.Y. 525, 89 N.E. 1109; *People ex rel. Peabody* v. *Baker*, 59 Misc. 359, 110 N.Y. Supp. 848; *Ex parte Slayback*, 209 Cal. 480, 288 Pac. 769; *Ex parte Brown*, 39 Wash. 160, 81 Pac. 552; *State* v. *Saffron*, 146 Wash. 202, 262 Pac. 970; *Ex parte Clark*, 86 Kan. 539, 121 Pac. 492; *People* v. *Dubina*, 304 Mich. 363, 8 N.W. 2d 99, certiorari denied, 319 U.S. 766. *Contra*, *Brown* v. *Urquhart*, 139 Fed. 846 (C.C.W.D. Wash.), reversed on other grounds, 205 U.S. 179. Prior to *People* v. *Dubina*, the Michigan Supreme Court had held invalid a commitment statute which precluded the confined person from subsequently securing any investigation and judicial determination of his sanity. *Underwood* v. *People*, 32 Mich. 1, 20 Am. Rep. 633. In *In re Boyett*, 136 N.C. 415, 48 S.E. 789, a North Carolina statute provided that a person acquitted of a capital crime on the ground of insanity and committed was not to be released except by a special act of the legislature. The statute was struck down because it expressly denied the person the right of habeas corpus and of a judicial determination of the validity of the detention. See Weihofen, *Mental Disorder as a Criminal Defense* 378 (1954).

quirements."[39] This same principle has been held applicable in proper cases to deprivations of liberty required in the public interest."[40]

The fact that in the District of Columbia a verdict of not guilty by reason of insanity must be returned where the trier of fact has no more than a reasonable doubt of the defendant's sanity does not render the defendant's commitment constitutionally invalid. The District of Columbia is not the only jurisdiction having a mandatory commitment statute in which the verdict of acquittal by reason of insanity has the same meaning.[41] Some state courts have upheld the commitment of defendants found not guilty by reason of insanity even where, between the date of the offense and the date of the acquittal, a specific determination of sanity had intervened.[42] The allowable area of choice permits such rulings by the law-makers in weighing the various considerations bearing on the problem.

Peculiarly pertinent is the observation made by the *amicus* (ACLU Br. 6–7) that Congress was faced with

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[39] See, *e.g.*, *Bailey* v. *Anderson*, 326 U.S. 203; *American Surety Co.* v. *Baldwin*, 287 U.S. 156; *Bragg* v. *Weaver*, 251 U.S. 57.

[40] *Yakus* v. *United States*, 321 U.S. 414, 443; *Hirabayashi* v. *United States*, 320 U.S. 81; cf. *Jacobson* v. *Massachusetts*, 197 U.S. 11.

[41] In Nebraska, for example (*Thompson* v. *State*, 159 Neb. 685, 68 N.W. 2d 267), the prosecution must prove sanity beyond a reasonable doubt, once the issue is properly raised.

[42] See *Hodison* v. *Rogers*, 137 Kan. 950, 22 P. 2d 491; *In re Ostatter*, 103 Kan. 487, 175 Pac. 377; *State* v. *Burris*, 169 La. 920, 125 So. 580; Annot., 88 A.L.R. 1084.

the task of reconciling conflicting interests: "If [the commitment] standards are unreasonably stringent, persons who would be entitled to an acquittal by reason of insanity may be reluctant to raise the defense. On the other hand, if the standards are unreasonably lax, juries may be overly chary of acquitting defendants on the grounds of insanity because of a belief that this would seriously jeopardize the security of the citizens of the District of Columbia." Congress has made its choice in a delicate area among standards which are not susceptible of objective or precise evaluation. That choice surely is not so irrational as to offend due process, especially when it is remembered that the commitment which occurs when there is a reasonable doubt of sanity is only the corollary of the rule that the defendant is acquitted where there is but a reasonable doubt of sanity. The commitment test is the exact equivalent of the acquittal test and was adopted in order to close any gap between an insanity acquittal and the furnishing of necessary care and treatment.

In the District of Columbia, the question has been thoroughly explored by the court of appeals and resolved adversely to petitioner. In *Ragsdale* v. *Overholser*, 281 F. 2d 943 (C.A. D.C.), the court explicitly upheld the present mandatory commitment statute against the contention made here. The court pointed out (*id.* at 948, 949) that implicit in a verdict of not guilty by reason of insanity is the conclusion that the defendant committed the acts

charged [44] and that there is a rational basis for the belief that he suffered from a mental disorder of which the offense was a product; [45] (2) that Congress might well have concluded that a hearing immediately following the verdict to determine the defendant's then mental condition would be meaningless because psychiatrists would not have had a reasonable opportunity to subject him to observation and examination and to report their findings; [46] (3) that

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[44] See also *Rucker* v. *United States*, 280 F. 2d 623, 625, 288 F. 2d 146 (C.A. D.C.). In 1883 Queen Victoria, shot at by a man who was found "not guilty on the ground of insanity," asserted that the man must have been guilty because she had seen him fire the pistol herself. Since that time the verdict in England has been "[g]uilty of the act or omission charged against him, but insane at the time." Trial of Lunatics Act, 1883. This verdict is generally contracted into "guilty but insane." Williams, *Criminal Law, The General Part* § 90; Royal Commission on Capital Punishment, *Report*, 156, 157 (1953).

[45] See *Tot* v. *United States*, 319 U.S. 463.

[46] The fact that between the date of the offense and the date of the commitment there has been a finding of competency to stand trial is, as the ACLU concedes (ACLU Br. 25), "not necessarily incompatible with the existence of mental illness, since under section 301(a) a person is competent to be tried as long as he is able to 'understand the proceedings against him * * * [and] properly to assist in his own defense.' See, *e.g.*, *Durham* v. *United States*, 237 F. 2d 760, 761 (D.C. Cir. 1956); *Williams* v. *Overholser*, 162 F Supp. 514 (D. D.C. 1958)." See also *Overholser* v. *Leach*, 257 F. 2d 667, 670, n. 4 (C.A. D.C.), certiorari denied, 359 U.S. 1013. There is reason to believe that in this very case the psychiatrist who testified at petitioner's trial declared that, although petitioner was competent to stand trial, he was nevertheless suffering from a mental illness at the time of trial. (R. 13; statement by counsel for petitioner on information and belief.) A finding of competency to stand trial, moreover, is not incompatible with dangerousness. *Overholser* v. *Leach*, *supra*.

it is not unreasonable to refuse to permit the defendant to remain at large while psychiatrists are attempting to determine whether he is dangerous, since a premature release could lead to the commission of new criminal acts, and (4) that the defendant may judicially test the legality of his confinement by a habeas corpus proceeding in which he is free to demonstrate by evidence that he has recovered to the point where he will not be dangerous to himself or to others." "In these circumstances," the court stressed, "the public interests sought to be protected outweigh * * * [petitioner's] claimed right to be set free the instant a verdict is returned" (281 F. 2d at 949). Judge Fahy, concurring (281 F. 2d at 950), agreed "that there is a rational relationship between mandatory commitment under section 24–301 and an acquittal by reason of insanity," and declared that "it is not undue process of law for society, in seeking a solution of the problem with which the legislation copes, to use such a provision as section 24–301, notwithstanding there is no finding of insanity, but only a doubt with respect to sanity, when section 24–301 comes into operation. See *Greenwood* v. *United States*, 350 U.S. 366." Differing divisions of the court of appeals have reaffirmed the holding on constitutionality in *Ragsdale*. *Curry* v. *Overholser*, 287 F. 2d 137 (C.A.D.C.); *Foller* v. *Overholser*, 292 F. 2d

* See *Greenwood* v. *United States*, 350 U.S. 366, 375; *Overholser* v. *O'Beirne*, *supra*, slip op., pp. 5, 16, 17. See also *Tatem* v. *United States*, 275 F. 2d 894 (C.A. D.C.); *Lewis* v. *Overholser*, 274 F. 2d 592 (C.A. D.C.); *Overholser* v. *Leach*, 257 F. 2d 667 (C.A. D.C.), certiorari denied, 359 U.S. 1013; *Stewart* v. *Overholser*, 186 F. 2d 339 (C.A.D.C.).

732, 734 (C.A.D.C.); *Overholser* v. *O'Beirne*, decided October 19, 1961 (C.A. D.C.)."

Petitioner's argument suffers from the fatal assumption that Congress, in formulating procedures to be followed after a verdict of not guilty by reason of insanity in a criminal trial, is required to duplicate civil commitment proceedings. But Congress may reasonably distinguish, for the reasons stated by the court of appeals in the *Ragsdale* case, between procedures for the civil commitment of individuals "engaged in the ordinary pursuits of life" and the treatment of that "exceptional class of people" who have committed acts forbidden by law and have been found not guilty by reason of insanity. *Overholser* v. *Leach*, 257 F. 2d 667, 669 (C.A. D.C.), certiorari denied, 359 U.S. 1013; *Overholser* v. *O'Beirne*, *supra*, slip op. p. 6." "[A] man who is in

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" The district court below agreed that Section 24–301 was constitutional: "I think the procedures set up in 301 are constitutional and I think they have been sustained by the Court of Appeals in a number of cases" (R. 15).

" Because this distinction is "rooted in reason," the argument that Section 24–301 deprives petitioner of the equal protection of the laws (ACLU Br. 28, 29) is without merit. Cf. *Minnesota ex rel. Pearson* v. *Probate Court of Ramsey County*, 309 U.S. 270, where this Court, in sustaining the Minnesota Sexual Psycopath statute, held (309 U.S. at 274–275): "Equally unavailing is the contention that the statute denies appellant the equal protection of the laws. The argument proceeds on the view that the statute has selected a group which is a part of a larger class. The question, however, is whether the legislature could constitutionally make a class out of the group it did select. That is, whether there is any rational basis for such a selection. We see no reason for doubt upon this point. Whether the legislature could have gone farther is not the question. The class it did select is identified by the state

a hospital because he has committed a crime, for which he has been exculpated, is a different individual from the individual who has been sent there as a mental case."[9]

This distinction is implicitly recognized in statutes of other jurisdictions which either, like Section 24-301, require automatic commitment after an acquittal by reason of insanity,[10] or grant to the court discretionary commitment authority in such cases without requiring post-trial inquiry,[11] or require

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court in terms which clearly show that the persons within that class constitute a dangerous element in the community which the legislature in its discretion could put under appropriate control. As we have often said, the legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. If the law 'presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.'" Accord, *People* v. *Chapman*, 301 Mich. 584, 592-597, 4 N.W. 2d 18, 23-24.

[9] Statement of Dr. Manfred S. Guttmacher, concurred in by Dr. Overholser (S. Rep. 1170, 84th Cong., 1st Sess., p. 14), in support of the District of Columbia mandatory commitment law.

[10] England, eleven states and the Virgin Islands have mandatory commitment laws. Criminal Lunatics Act, 40 Geo. 3, c. 94 (1800); Trial of Lunatics Act, 46 & 47 Vict., c. 38, s. 2 (1883); Colo. Rev. Stat. Ann. § 39-8-4 (Supp. 1957); Ga. Code Ann. § 27-1503 (1953); Hawaii Rev. Laws, 1955, § 258-33; Kan. Gen. Stat. Ann. § 62-1532 (1949); Mich. Stat. Ann. § 28.1033(3) (1954); Minn. Stat. Ann. § 631.19 (Supp. 1960); Neb. Rev. Stat. 1943, § 29-2203 (Reissue of 1956); Nev. Rev. Stat. Ann. § 175.445 (1955); Ohio Rev. Code Ann. § 2945.39 (1953); N.Y. Sess. Laws, 1960, Ch. 550, §§ 1-3; Wis. Stat. Ann. § 957.11 (1958); V.I. Code Ann. § 5-3637 (1957).

[11] Ark. Stat. Ann. § 59-242 (Supp. 1959); Conn. Gen. Stat. § 54-37 (Supp. 1959); Del. Code Ann., Title 11, § 4702 (1960 Supp.); La. Rev. Stat. Ann. § 28.59 (1951); Me. Rev. Stat. Ann., Ch. 27, § 119 (1954); N.M. Stat., 1953, Ann. § 41-13-3 (1954);

commitment upon notice that the grand jury has refused to indict because of insanity at the time of the offense."[28]

It is the failure to distinguish between ordinary civil commitment and commitment under Section 24–301 which accounts for petitioner's erroneous assumption that, to support the constitutionality of Section 24–301, it is necessary to argue that a presumption can be made, from the verdict of not guilty by reason of insanity, that the defendant, at the time of the commitment, actually suffers from a mental disorder (Pet. Br. 49). In urging that it is not rational to presume, from a finding implying only a reasonable doubt of sanity at the time of the commission of the offense, that the defendant is in fact mentally ill at the time of the commitment, petitioner is refuting an argument which we do not make. The only presumption which it is necessary to defend is that a finding of not guilty by reason of insanity—*i.e.*, that the defendant committed an act proscribed by law, but that there is a rational doubt whether the act was the product of a mental disease or defect—supports the inference that the defendant *may* still be mentally ill and therefore *may* repeat his anti-social conduct if not treated. We doubt that petitioner would argue that this inference "is so strained as not to have a reasonable relation to the circumstances of life as we

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Pa. Stat. Ann., Title 19, § 1351 (1930); S.C. Code Ann. § 32-927 (1960 Cum. Supp.).

[28] See Lindman and McIntyre, *The Mentally Disabled And The Law*, 348 (1961).

know them." *Tot* v. *United States*, *supra*, 319 U.S. at 468. And since Congress could rationally make this assumption, it could provide for commitment for further observation and treatment to the extent necessary."

B. THE CONSTITUTIONALITY OF THE RELEASE PROVISIONS IS NOT IN ISSUE IN THE PRESENT CASE

Petitioner suggests that habeas corpus is an inadequate remedy because the court of appeals has interpreted Section 24-301 to place what is in petitioner's view too great a burden upon the individual seeking release (Pet. Br. 52). But what constitutes an appropriate standard for determining, in a habeas corpus proceeding, whether the petitioner is entitled to be released is not a question properly before this Court at this time. Petitioner has never made the claim during this proceeding that he is now of sound mind, and the uncontradicted evidence in the record shows that he is not (R. 8). As the dissenting opinion below

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" The constitutionality of petitioner's commitment is not affected by the fact that the offenses with which he was charged were misdemeanors. Felonies do not exhaust the list of dangerous activities which society has a stake in controlling. Nor does the fact that petitioner's offenses did not involve violence invalidate his commitment. To say that society is not threatened by the kind of conduct for which petitioner was prosecuted "is to confuse danger with violence." *Overholser* v. *O'Beirne*, *supra*, slip op., p. 10. In England, the result of a verdict of "guilty but insane" is a court order requiring the accused to be detained in Broadmoor Institution "until Her Majesty's pleasure be known." While at first applicable only to cases involving felonies, Criminal Lunatics Act, 1800, the provision was extended to misdemeanors in 1883. Trial of Lunatics Act, s. 2; see Williams, *Criminal Law, The General Part*, § 89.

notes, petitioner attacks his detention solely upon the ground that his *commitment* was invalid (R. 41). The issue, therefore, is the validity of his initial commitment—not the standards governing his eligibility for release.

To be sure, the commitment in the present case is validated, in part, on the ground that habeas corpus is subsequently available. But if the general availability of habeas corpus with constitutionally sufficient standards governing burden of proof were sufficient to validate the commitment, it would be inappropriate, in advance of a specific habeas corpus proceeding testing the particular petitioner's eligibility for release, to invalidate a commitment on the ground that in *other* cases the standards applied in release proceedings have not met constitutional requirements. Cf. *Liverpool, N.Y. & P.S.S. Co.* v. *Commissioners*, 113 U.S. 33, 39; *United States* v. *Raines*, 362 U.S. 17. If, for example, in a habeas corpus proceeding, a petitioner, claiming eligibility for release, were unable to adduce any proof whatsoever in support of his claim, a court would properly deny the petition for habeas corpus without reaching the constitutional issue because the petitioner would not be able to satisfy any appropriate standard relating to the burden of proof of his sanity.

That it is unnecessary to decide the abstract constitutional question posed here appears from the very arguments advanced in support of the contention that the release procedures formulated by the court of appeals are unconstitutional. Thus, the ACLU argues (ACLU Br. 36–38) that a sociopath, even if

classified as "sane,"[14] might, under the decisions of the court of appeals, be held in a mental institution as suffering from an "abnormal mental condition" (*Overholser* v. *Leach*, 257 F. 2d 667 (C.A. D.C.), certiorari denied, 359 U.S. 1013), and that this may result in indefinite confinement because it is difficult to treat sociopaths.[15] But according to the respondent's return to the petition for a writ of habeas corpus, which is uncontroverted by any other evidence in the record, *petitioner* is suffering, not from a sociopathic personality, but from a "Manic Depressive Reaction, Manic Type" (R. 8). Certainly, it would violate all accepted principles of judicial restraint in dealing with constitutional questions in a case not involving a sociopath to hold a commitment unconstitutional because it may be thought to be illegal to subject a sociopath to continuing confinement for failure to satisfy the requirements of the release statute.[16]

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[14] St. Elizabeths Hospital presently classifies the sociopathic personality as a "mental disease" (see *Overholser* v. *O'Beirne*, *supra*, slip op., p. 8; *In re Rosenfield*, 157 F. Supp. 18 (D. D.C.), reversed, 262 F. 2d 34 (C.A. D.C.)), although there is still considerable dispute about this terminology among psychiatrists (see *Blocker* v. *United States*, 288 F. 2d 853, 859–860 (C.A. D.C.)).

[15] See Weihofen, *Mental Disorder As a Criminal Defense* 27 (1954); Comment, *Releasing Criminal Defendants Acquitted and Committed Because of Insanity; The Need For Balanced Administration*, 68 Yale L.J. 293, 303 n. 44 (1958).

[16] "" * * [O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines*, *supra*, 362 U.S. at 21.

C. THE STANDARDS FOR DETERMINING ELIGIBILITY FOR RELEASE ARE CONSISTENT WITH DUE PROCESS

If the constitutionality of the standards for determining eligibiilty for release is properly before the Court in this case, we submit that those standards are wholly consistent with due process.

1. *To qualify for release, a petitioner is properly required to establish that he is no longer suffering from an abnormal mental condition.*—Under Section 24–301(e) (App., *infra*, pp. 91–93), when a person has been confined in a hospital for the mentally ill pursuant to subsection (d), and the hospital superintendent certifies that such person (1) has recovered his insanity, (2) will not (in the opinion of the superintendent) be dangerous to himself or others in the reasonable future and (3) is entitled (in the opinion of the superintendent) to his unconditional release from the hospital, the certificate is sufficient to authorize the court to order the unconditional release of the person so confined. The court in its discretion may, or upon objection of the United States or the District of Columbia must, after due notice, hold a hearing at which evidence as to the mental condition of the person confined may be submitted, including the testimony of one or more psychiatrists from the hospital. If the court, after weighing the evidence, finds that the person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, it must order him unconditionally released. If the court does

not so find, it must order the person returned to the hospital."

Subsection (e) does not provide for a judicial proceeding in the absence of a certificate from the superintendent of the hospital. Subsection (g) (App., *infra*, p. 93), however, provides that: "Nothing herein contained shall preclude a person confined under the authority of this section from establishing his eligibility for release under the provisions of this section by a writ of habeas corpus."

The standards for determining eligibility for release in a habeas corpus proceeding have been delineated in a series of decisions by the court of appeals. These standards were recently reviewed by that court in *Overholser* v. *O'Beirne, supra*, slip op., pp. 5–6:

> Under standards established in a series of cases beginning with *Overholser* v. *Leach* [*Ragsdale* v. *Overholser*, 281 F. 2d 943 (C.A. D.C.); *Overholser* v. *Russell*, 283 F. 2d 195 (C.A. D.C.); *Starr* v. *United States*, 264 F. 2d 377, certiorari denied, 359 U.S. 936; *Overholser* v. *Leach*, 257 F. 2d 667 (C.A.D.C.), certiorari denied, 359 U.S. 1013], we have construed § 301(g) as requiring the petitioner who seeks release without the statutory medical certification of recovery to show (1) that he has recovered his sanity and (2) that such recovery has reached the point where he has no abnormal mental condition which in the reasonably for-

[17] The statute contains comparable provisions governing cases in which the superintendent does not certify that the person confined is in such a condition as to warrant his unconditional release, but does certify that his condition warrants conditional release under supervision.

> seeable future would give rise to danger to the petitioner or to the public in the event of his release. The mere fact that a person so confined has some dangerous propensities does not, standing alone, warrant his continued confinement in a government mental institution under § 24:301 D.C. Code. The dangerous propensities, as we have noted, must be related to or arise out of an abnormal mental condition. See *Starr* v. *United States*, 105 U.S. App. D.C. 91, 264 F. 2d 377 (1958). That abnormal mental condition may be the precise mental condition which constituted the basis for his acquittal or it may be a residual condition remaining in a person who has improved.

The rationale for this interpretation of subsection (g) was stated by Judge Washington, speaking for a unanimous court in *Overholser* v. *Leach*, *supra*, 257 F. 2d at 669–670:

> The test of this statute is not whether a particular individual, engaged in the ordinary pursuits of life, is committable to a mental institution under the law governing civil commitments. Cf. *Overholser* v. *Williams*, 1958, 102 U.S. App. D.C. 248, 252 F. 2d 629. Those laws do not apply here. This statute applies to an exceptional class of people—people who have committed acts forbidden by law, who have obtained verdicts of "not guilty by reason of insanity," and who have been committed to a mental institution pursuant to the Code [footnote omitted]. People in that category are treated by Congress in a different fashion from persons who have somewhat similar mental conditions, but who have not committed offenses or obtained verdicts of not guilty by reason of

> insanity at criminal trials. The phrase "establishing his eligibility for release," as applied to the special class of which Leach is a member, means something different from having one or more psychiatrists say simply that the individual is "sane." There must be freedom from such abnormal mental condition as would make the individual dangerous to himself or the community in the reasonably foreseeable future.

The standard adopted by the court of appeals is an appropriate interpretation of the statute.[57a] It allows for the fact that recovery from a behavior disorder, unlike recovery from most physical illness, "does not come overnight," but is "slow and dubious at best and * * * rarely as predictable as the course of a physical disease." *Overholser* v. *O'Beirne, supra,* slip op., p. 14. The concept of "abnormal mental condition" encompasses the idea that a patient may progress from what is indisputably a "mental disease" to a condition which cannot with confidence be so labeled but which nevertheless potentially exposes himself or others to danger. See *ibid.; Ragsdale* v. *Overholser,* 281 F. 2d 943, 947 (C.A. D.C.). The test of legal responsibility for crime is not necessarily the test appropriate for determining whether commitment—the purpose of which is the protection of the individual

[57a] The "abnormal mental condition" standard has been concurred in by all nine judges of the Court of Appeals. The opinion in the *Leach* case was written by Judge Washington and joined in by then Chief Judge Edgerton and Judge Burger. It was adhered to by Judges Miller, Prettyman, Danaher and Bastian in the *Starr* case (264 F. 2d at 383) and by Judges Bazelon and Fahy in *Hough* v. *United States,* 271 F. 2d 458, 461, 462 (C.A.D.C.).

and of society—should continue."[35] The District of Columbia general standard—freedom from an abnormal mental condition making the individual dangerous—rationally balances both personal and communal interests.

2. *The burden of proof in a release proceeding is consistent with due process.*—Subsection (g) of Section 24–301 (App., *infra*, p. 92) indicates that the burden of proof in a release proceeding is on the petitioner. In *Overholser* v. *Leach*, 257 F. 2d 667, 669 (C.A. D.C.), certiorari denied, 359 U.S. 1013, the court of appeals ruled that the petitioner must show that the refusal of the superintendent of the hospital to certify that the petitioner had recovered his sanity and would not in the reasonable future be dangerous to himself or others was arbitrary and capricious. And in *Ragsdale* v. *Overholser*, 281 F. 2d 943, 947 (C.A. D.C.), the court declared that "[i]n a 'close' case even where the preponderance of evidence favors the petitioner, the doubt, if reasonable doubt exists about danger to the public or the patient, cannot be resolved so as to risk danger to the public or the individual."

There can be no constitutional barrier to placing such a burden on the patient to establish his eligibility for release. Release after acquittal by reason of insanity generally demands a stronger showing of

[35] It has been noted that such a test may lead to premature release. See the comments on *Yankulov* v. *Bushong*, 80 Ohio App. 497, 77 N.E. 2d 88 in Comment, *Releasing Criminal Defendants Acquitted And Committed Because of Insanity: The Need for Balanced Administration*, 68 Yale L.J. 293, 301, n. 39; Weihofen, *Mental Disorder As A Criminal Defense*, 376, n. 1 (1954).

restoration to sanity than would be appropriate in a noncriminal case." It is not unreasonable to place upon a person confined in a mental institution pursuant to an acquittal by reason of insanity a strong burden of proof on that issue." Such an individual has committed a harmful act proscribed by law, and may repeat it or like acts. If, in the opinion of the superintendent of the institution to which he is committed, he should not be at large for reasons of public safety or safety to himself, and if he fails, in a judicial hearing, to dispel a rational doubt that he has recovered his sanity and will not be dangerous, he should not be entitled to discharge.

The fact that the burden of proof may be less favorable to petitioner in the District of Columbia than in some other jurisdiction is not dispositive of the issue of due process. In 1951, the State of Oregon was the only jurisdiction in which the accused, on a plea of insanity, was required to establish that defense beyond a reasonable doubt. Twenty other states, however, placed the burden upon the accused to establish his insanity by a preponderance of the evidence or by a similar measure of persuasion. This Court rejected the contention that the Oregon statute contravened the due process clause of the Fourteenth Amendment. *Leland v. State of Oregon*, 343 U.S. 791. The Court concluded (*id.* at 798) that there was "no practical difference of such magnitude as to be significant in

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[11] See *People* v. *Dubina*, 311 Mich. 482, 18 N.W. 2d 902, 903; Weihofen and Overholser, *Commitment Of The Mentally Ill*, 24 Tex. L. Rev. 307, 329, n. 68.

[12] See *Barry* v. *White*, 64 F. 2d 707 (C.A. D.C.); Weihofen, *Mental Disorder as a Criminal Defense* 382 (1954).

determining the constitutional question * * *. Oregon merely requires a heavier burden of proof." Quoting from *Snyder* v. *Massachusetts*, 291 U.S. 97, 105, ([redacted], the Court held (343 U.S. at 799) that Oregon's procedure did "not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." In so holding, the Court stressed its reluctance to interfere with Oregon's policy since it could not "say that policy violates generally accepted concepts of basic standards of justice."

The defendant in *Leland* v. *State of Oregon* was tried for murder in the first degree and was sentenced to death. A judgment affirming the conviction was affirmed by this Court even though the State had imposed upon the defendant the burden of proving beyond a reasonable doubt the absence of one of the essential elements of murder, *i.e.*, that the defendant had a mind capable of committing that offense. The issue here, on the other hand, is not the burden of proof with respect to an element of murder or any other criminal offense, but the procedure to be followed to determine eligibility for release from a mental hospital. The result of an adverse determination in this case is neither a sentence of death nor any other form of punishment, but continued treatment. If the Oregon-imposed burden of proof in a first-degree murder trial was consistent with the due process clause of the Fourteenth Amendment, surely the burden of proof announced by the court of appeals for a Section 24-301(g) proceeding is consistent with the due process clause of the Fifth Amendment.

3. *It is not improper to rely on the judgment of the hospital authorities.*—Courts have long been aware that they assume grave responsibility in ordering the discharge of a patient who, in the opinion of the superintendent of the mental institution in which he is confined, should not be at large for reasons of public safety.[41] The responsibility is increased when the individual seeking release has committed acts forbidden by law and the question is whether, because of an abnormal mental condition which prompted the commission of those acts, he is likely to continue or repeat his conduct. Many state legislatures, like Congress in enacting Section 24–301, have recognized this responsibility by imposing conditions upon the release of such a person which go beyond a mere showing of restoration to sanity. Thus, some states require, in addition, a finding that he will not be dangerous if released, or that there is no danger of a relapse.[42] In other states, the court may act only after the hospital authorities have certified that the person confined has recovered.[43]

In determining a patient's fitness to be returned to the community, it is entirely proper for the court

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[41] See *Overholser* v. *De Marcos*, 149 F. 2d 23 (C.A. D.C.), certiorari denied, 325 U.S. 889; *Ex parte Rath*, 143 Wash. 65, 254 Pac. 466; *People ex rel. Romano* v. *Thayer*, 229 App. Div. 687, 242 N.Y.S. 289, 292; cf. *Ekiu* v. *United States*, 142 U.S. 651, 662. "The story is still told in the District of Columbia of a mental patient who a few days after his release on habeas corpus shot and killed the lawyer who had represented him in the proceeding!" Weihofen and Overholser, *Commitment Of The Mentally Ill*, 24 Tex. L. Rev. 307, 335 (1946).

[42] See Weihofen, *Mental Disorder As A Criminal Defense* 376, n. 1 (1954).

[43] Id. at 376, n. 4.

to defer to the authorities of the hospital in which the patient is under daily supervision and to whom his history and mental condition are most familiar. These authorities "would appear to be best qualified to exercise the major responsibility for discharging patients."[44] Confronted with problems of space, the authorities in our public institutions are hardly motivated to retain patients who have recovered and are no longer dangerous.[45] Courts, moreover, are not well-equipped to make medical findings.[46]

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[44] Lindman and McIntyre, *The Mentally Disabled and the Law* 126 (1961). In Lamb, *Commitment and Discharge of Insane Criminals*, 32 N.Y.S. B.A. Rep. 59, 66 (1909), it is related that the court discharged 34 of 41 mental patients notwithstanding medical advice to the contrary; 14 were reincarcerated, either in prisons or mental hospitals. See Comment, *Releasing Criminal Defendants Acquitted and Committed Because of Insanity: The Need For Balanced Administration*, 68 Yale L.J. 293, 305, n. 56.

[45] See also *Ex parte Rath*, *supra*, n. 61; Weihofen and Overholser, *Commitment Of The Mentally Ill*, 24 Tex. L. Rev. 307, 333 (1946). See also Lindman and McIntyre, *supra*, at 127. Of course, as the court of appeals held in *Overholser* v. *De Marcos*, 149 F. 2d 23 (C.A.D.C.), certiorari denied, 325 U.S. 889, "an inmate of St Elizabeths Hospital petitioning for habeas corpus might demand the expert testimony of members of the Commission on Mental Health, or that the court on its own motion might require it. This gives any inmate of St. Elizabeths the protection of a diagnosis by independent experts." 149 F. 2d at 25. See also *De Marcos* v. *Overholser*, 137 F. 2d 698 (C.A. D.C.), certiorari denied, 320 U.S. 785. In *Curry* v. *Overholser*, 287 F. 2d 137 (C.A.D.C.), the court of appeals said: "We think this relief is available to all indigent inmates of the hospital, including those committed under section 24–301," 287 F. 2d at 140, and that "[n]on-indigent inmates, if good cause is shown, should also be entitled to relief under De Marcos." *Ibid.*, n. 4.

[46] See *Overholser* v. *De Marcos*, 149 F. 2d 23, 24 (C.A.D.C.), certiorari denied, 325 U.S. 889; Comment, *Releasing Criminal*

On the other hand, it would not be possible to dispense with a judicial proceeding to determine eligibility for release without raising constitutional questions. Reconciliation of the opportunity for a judicial hearing with (1) deference to the institutional authorities, (2) the vital public interest in securing freedom from acts forbidden by law, and (3) a decent regard for the patient's own protection, is the problem which Congress faced in enacting Section 24–301, and the problem which has faced the court of appeals in interpreting and applying it. The balance struck by Congress and the court of appeals meets the essential requirements of due process.

At issue here is the constitutionality—not the wisdom—of the scheme embodied in Section 24–301. Whether the formal civil commitment standards applicable in some jurisdictions should be used in criminal cases is for the legislative branch to decide. See *Overholser* v. *O'Beirne, supra,* slip. op., p. 4. So long as the Congressional choice meets the minimum standards of due process, it cannot be overthrown by the courts in favor of another system which may seem preferable.

Defendants Acquitted and Committed Because of Insanity: The Need for Balanced Administration, 68 Yale L.J. 293, 302 (1958); Note, *Constitutionality of Nonjudicial Confinement,* 3 Stan. L. Rev. 109, 110 (1950).

V

THERE WERE NO OTHER CONSTITUTIONAL INFIRMITIES AT THE TRIAL OR DURING PETITIONER'S CONFINEMENT

A. THE CLAIM THAT PETITIONER WAS DEPRIVED OF HIS RIGHT TO COUNSEL IS WITHOUT MERIT

The *amicus* (ACLU Br. 58–59), but not petitioner, contends that petitioner was deprived of the effective assistance of counsel guaranteed by the Sixth Amendment because, although counsel was appointed for petitioner before the trial, petitioner "was not afforded the right of representation" prior to that time (ACLU Br. 58).

1. This claim, as the ACLU recognizes, was presented neither in the habeas corpus petition nor in the petition for certiorari. While, under Rule 40(1)(d)(2), the Court may at its option notice a plain error not presented in *the petition for certiorari*, "[i]t is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." (*Duignan* v. *United States*, 274 U.S. 195, 200).[47] This principle applies with special force where the question is presented for the first time in this Court, and not even by the petitioner. Petitioner was represented by counsel when he filed his petition for a writ of habeas corpus. The Court should not consider claims not made therein.

2. Even if there were a right to appointed counsel in federal misdemeanor cases,[48] prejudice would have

[47] See also *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16; *Husty* v. *United States*, 282 U.S. 694, 701, 702.

[48] See Comment, *The Right to Counsel in Misdemeanor Cases*, 48 Calif. L. Rev. 501, 505–506 (1960).

to result from the absence of counsel at arraignment in order to render the proceedings invalid." In the present case no prejudice is shown. The only prejudice suggested by the ACLU (ACLU Br. 59) is that counsel could have objected (1) to the finding in the hospital report as to petitioner's sanity at the time of the crimes, on the basis that this finding went beyond the requirements of the statute governing pre-trial examinations and reports[70] and (2) to the fact that the report from the D.C. General Hospital was submitted by the Assistant Chief Psychiatrist rather than the Chief Psychiatrist. These objections, however, were both available to counsel at the trial.

In *Canizio* v. *New York*, 327 U.S. 82, the petitioner, unrepresented by counsel, had entered a guilty plea to a charge of robbery, but had counsel at sentencing.

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[69] *Williams* v. *Swope*, 186 F. 2d 897, 899 (C.A. 9); *Thompson* v. *King*, 107 F. 2d 307 (C.A. 8); *Setser* v. *Welch*, 159 F. 2d 703 (C.A. 4), certiorari denied, 331 U.S. 840; *Hiatt* v. *Gann*, 170 F. 2d 473 (C.A. 5), certiorari denied, 337 U.S. 920; *Gann* v. *Pescor*, 164 F. 2d 113 (C.A. 3); *Wilfong* v. *Johnston*, 156 F. 2d 507, 509 (C.A. 9); *De Maurez* v. *Swope*, 104 F. 2d 758, 759 (C.A. 9); *In re Reed*, 158 F. 2d 323, 324 (C.A.D.C.); *McJordan* v. *Huff*, 133 F. 2d 408 (C.A.D.C.); *Alexander* v. *United States*, 136 F. 2d 783 (C.A.D.C.); *Dorsey* v. *Gill*, 148 F. 2d 857, 875 (C.A.D.C.), certiorari denied, 325 U.S. 890; *Saylor* v. *Sanford*, 99 F. 2d 605, 606 (C.A. 5); cf. *Canizio* v. *New York*, 327 U.S. 82. The flat and unqualified statement that "we take it to be established that in cases arising in federal courts no specific prejudice need be shown where there is a deprivation of the right to counsel" (ACLU Br. 58, 59) is unsupported by authority and is refuted by the authorities we have cited immediately above.

[70] But see *Winn* v. *United States*, 270 F. 2d 326 (C.A.D.C.), certiorari denied, 365 U.S. 848; *Calloway* v. *United States*, 270 F. 2d 334 (C.A.D.C.).

Counsel, however, did not move to withdraw the plea. Mr. Justice Black, speaking for the Court, noted that the court below had been satisfied that "even though petitioner may not have had counsel at the beginning, he had counsel in ample time to take advantage of every defense which would have been available to him originally" (327 U.S. at 86), and said (*ibid.*):

> We think the record shows that petitioner actually had the benefit of counsel. When that counsel took over petitioner's defense he could have raised the question of a defect in the earlier part of the proceedings [footnote omitted].

The decision in *Canizio,* while based upon the due process clause of the Fourteenth Amendment, was that petitioner *had the benefit of counsel,* and is thus as applicable to federal criminal trials as to state proceedings. *Williams* v. *Swope, supra; Gann* v. *Pescor, supra; Hiatt* v. *Gann, supra; Setser* v. *Welch, supra.* The *Canizio* decision, involving a defendant who pleaded guilty without representation by counsel, is *a fortiori* applicable where the defendant pleads not guilty.[11]

B. THE CLAIM THAT PETITIONER DID NOT HAVE ADEQUATE NOTICE OF THE PROCEEDINGS IS WITHOUT MERIT

1. Petitioner argues that he "had no formal notice that his hearing upon a criminal charge would be transformed into a hearing upon his sanity" (Pet. Br. 24) (see also ACLU Br. 57–58). This claim, too,

[11] Compare *Hamilton* v. *Alabama,* No. 32, O.T. 1961, decided November 13, 1961, a capital case, where, under state law, only at arraignment could the defense of insanity be raised, and could motions to quash, based on systematic exclusion of one race from grand juries or on the ground that the grand jury was otherwise improperly drawn, be made.

was not made in the petition for a writ of habeas corpus and for that reason should not be considered here (see *supra*, p. 75).

2. In any event, the contention has no merit. Petitioner's trial was not "transformed into a hearing upon his sanity." The charges against him, of which he had due notice,[11] were originally, and continued to be at the trial, that he had cashed bad checks. Notwithstanding the suggestion to the contrary in the dissenting opinion below (R. 40), there is nothing in the record to suggest that "the case was turned into an inquiry concerning * * * [petitioner's] sanity at the time the checks were cashed." It is perfectly consistent with the record to conclude—indeed the judgment of acquittal by reason of insanity implies[12]—that the government introduced evidence to prove that petitioner in fact cashed the bad checks. The question of sanity was thus but one of the questions involved in the case.

Moreover, there is nothing in the record to show that petitioner was surprised, either by the refusal of the trial judge to allow him to substitute pleas of guilty for his previously entered pleas of not guilty, or by the fact that the physician was called to the stand, or by the testimony of the physician. The second hospital report, indicating that petitioner was of unsound mind at the time of the offenses, was a matter of record; the District of Columbia Circuit

[11] Almost seven weeks elapsed between the date of the filing of the informations (November 6, 1959) and the date of trial (December 29, 1959) (R. 21, 25).

[12] See *Ragsdale* v. *Overholser*, 281 F. 2d 943, 948 (C.A. D.C.).

had previously handed down several rulings (see the *Tatum, Clark* and *Plummer* cases, discussed *supra*, p. 36, fn. 22) holding that a defense of insanity could not be abandoned by counsel; and there was also precedent in the Municipal Court for the refusal to accept a plea of guilty in the circumstances of the present case (see *Williams* v. *District of Columbia*, 147 A. 2d 773, 774 (D.C. Mun. Ct. App.)). The record does not show, nor is it alleged here, that petitioner's counsel claimed surprise or requested a continuance. Under the circumstances, the presumption of regularity obtains (see *supra*, p. 23, fn. 7) and petitioner's belated claim of lack of notice is without substance.

C. THE BURDEN OF PROOF AT TRIAL WAS CONSISTENT WITH DUE PROCESS

1. Petitioner urges (Pet. Br. 26) that he was denied due process of law in that he "was in practical effect under the burden of disproving insanity beyond all reasonable doubt—if he were to prevail against the Government in this matter." But there is no constitutional barrier to a judgment of not guilty by reason of insanity where the government has raised a reasonable doubt of the defendant's sanity. (It should be noted again that the government is always required to establish beyond a reasonable doubt that the accused committed the acts charged; otherwise a judgment of not guilty must be entered. In the present case, therefore, it must be assumed that the commission by petitioner of acts forbidden by law was proved beyond a reasonable doubt.)

The question of the burden of proof on the issue of insanity is analogous to the question of the con-

stitutionality of the District of Columbia mandatory commitment law, *i.e.*, whether it is consistent with the due process clause of the Fifth Amendment to commit a defendant found not guilty by reason of insanity when the verdict implies only a reasonable doubt of the defendant's sanity. The argument made in defense of the District of Columbia statute similarly refutes petitioner's argument with respect to the burden of proof (see *supra*, pp. 58–61, 69–71; *Leland* v. *Oregon*, *supra*).

2. Moreover, even if the burden of proof necessary to meet the requirements of due process were higher than proof merely raising a reasonable doubt of sanity, the burden would be met here. The record reflects that a single physician testified at the trial, and that his testimony was to the effect that the crimes with which petitioner was charged were the product of mental illness (R. 19). The district court found, and the record does not show otherwise, that no testimony was offered by petitioner with respect to his mental condition at the time of the offenses (R. 19). Thus, on the basis of the record in this case, whatever burden might be postulated as satisfying constitutional requirements was met.

D. PETITIONER WAS NOT ENTITLED UNDER THE FIFTH OR SIXTH AMENDMENTS TO THE APPOINTMENT OF PSYCHIATRISTS AT GOVERNMENT EXPENSE

Petitioner contends (Pet. Br. 25) that he lacked "a meaningful opportunity to test, explain and refute" the testimony of the physician who was called at his trial, urging that such opportunity "mean[s] nothing

more or less than an opportunity for independent psychiatric scrutiny of the facts and the procurement of private psychiatrists on behalf of the petitioner." Petitioner claims further that "[s]ince * * * [he] was indigent, this opportunity could be accorded to him only if private psychiatrists were made available to him at Government expense" (see also ACLU Br. 56–57).

1. There is nothing in the record to show that petitioner, who was then represented by counsel, ever requested the appointment of private psychiatrists at government expense at his trial (see *United States ex rel. Smith* v. *Baldi*, 344 U.S. 561, 568). Although the Municipal Court Criminal Rules do not provide for the appointment of private psychiatrists, the issue could and therefore should have been raised at the trial level.[14]

2. Petitioner, moreover, did not make the claim in his petition for a writ of habeas corpus. Nor was the question considered or decided by the court of appeals. The claim should therefore not be considered here (see *supra*, p. 75).

3. The Assistant Chief Psychiatrist of the D.C. General Hospital—an impartial expert and not a partisan of the prosecution—had submitted a pretrial report declaring that in his opinion petitioner was of unsound mind at the time of the offenses, and that the offenses were the products of this mental illness (R.

[14] Had the issue been presented to the trial court and had the trial court ruled in petitioner's favor, that court, if it felt that it lacked power to appoint psychiatrists at government expense, could have dismissed the informations.

24). The record shows that at the trial a physician "representing" the same hospital testified similarly (R. 19). Thus the situation here is comparable to that in *McGarty* v. *O'Brien*, 188 F. 2d 151 (C.A. 1), certiorari denied, 341 U.S. 928, where, in accordance with the Massachusetts Briggs Law, the petitioner had been committed, after indictment for murder, to the State Department of Mental Health, to be examined, as the law required, "with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility" (188 F. 2d at 152). The report of the examining psychiatrists was unfavorable to a defense of insanity. Petitioner then moved to be allowed to employ psychiatric experts at the expense of the Commonwealth, but the motion was denied. On appeal from the dismissal of a habeas corpus petition, Judge Magruder, speaking for a unanimous court, said (*id.* at 155):

> This is not a case where the state has refused to provide an impartial psychiatric examination of the accused with a view to determining his sanity and criminal responsibility. Quite the contrary, in compliance with a mandatory provision of law, the state has, at public expense, provided such examination by two impartial experts, and their joint report has been made available to the defense. The doctors designated by the Department of Mental Health to make the examination are not partisans of the prosecution, though their fee is paid by the state, any more than is assigned counsel for the defense beholden to the prosecution merely

> because he is paid by the state. Each is given a purely professional job to do—counsel to represent the defendant to the best of his ability, the designated psychiatrists impartially to examine into and report upon the mental condition of the accused.

Recognizing that the examination and report by the Department of Mental Health did not preclude the introduction of expert witnesses by the defense in contradiction of the conclusions of the report, the court concluded that the state did not have "the constitutional obligation to promote such a battle of experts by supplying defense counsel with funds wherewith to hunt around for other experts who may be willing, as witnesses for the defense, to offer the opinion that the accused is criminally insane" (*id.* at 157). The court indicated the consequences of a contrary holding, stating (*ibid.*):

> * * * [S]uppose the defense motion had been granted here, and assigned counsel had been authorized to employ two other experts to examine the accused; The two so chosen might, after examination of the defendant, have arrived at the same professional conclusion stated in the report of the psychiatrists designated by the Department of Mental Health. Would the defendant then be entitled to further financial assistance from the state to continue the search, merely because a defendant of ample private wealth would perhaps have been able eventually to find a more favorable psychiatrist somewhere in the United States, or even in Europe? We would think not; examination and report by two

> competent and impartial experts supplied at state expense is enough, we think, to satisfy the state's constitutional obligation under the due process clause." * * *

The decision in *McGarty* v. *O'Brien* was cited with approval by this Court in *United States ex rel. Smith* v. *Baldi*, 344 U.S. 561, in which the Court rejected the contention that, in order to afford the petitioner "adequate counsel" (*id.* at 568), the trial court was constitutionally required to appoint a psychiatrist to make a pre-trial examination, saying (*ibid*):

> We cannot say that the State has that duty by constitutional mandate. See *McGarty* v. *O'Brien*, 188 F. 2d 151, 155. As we have shown, the issue of petitioner's sanity was heard by the trial court. Psychiatrists testified. That suffices.

Although the *Baldi* case involved a trial in a state court, this Court's rejection of the contention that the appointment of a psychiatrist was necessary to afford the petitioner "adequate counsel" strongly suggests that a similar claim under the Sixth Amendment should fare no better. Furthermore, it is difficult to see why there should be any difference in this respect between the requirements of the due process clause of the Fourteenth Amendment, held in the *Baldi* and *McGarty* cases not to require the provision of private psychiatrists at government expense, and of the due process clause of the Fifth Amendment. This Court has specifically held, moreover, that in a federal criminal trial the decision to direct witnesses to be

[11] See also *Commonwealth* v. *Belenski*, 276 Mass. 35, 176 N.E. 501; *State* v. *McManus*, 187 La. 9, 174 So. 91.

summoned by the defendant at government expense is within the discretion of the trial court, and not subject to review by this Court. *Goldsby* v. *United States*, 160 U.S. 70, 73; *United States* v. *Van Duzee*, 140 U.S. 169, 173; *Crumpton* v. *United States*, 138 U.S. 361, 364–365."

Certainly, in cases where the defendant has been examined by impartial psychiatrists, this Court's opinion in *Griffin* v. *Illinois*, 351 U.S. 12, should not be read to require private psychiatric testimony at government expense. The impracticability of such a holding is reflected in the comments of the United States Court of Appeals for the Third Circuit in *United States* v. *Baldi* (192 F. 2d 540, 547):

> Here Smith was, at public expense, given two thoroughly competent lawyers. The same argument that would entitle them to psychiatric consultation would entitle them to consultation with ballistic experts, chemists, engineers, biologists, or any type of expert whose help in a particular case might be relevant. We do not think the requirements of due process go so far. * * *

B. PETITIONER'S CONFINEMENT IS NOT UNCONSTITUTIONAL BECAUSE OF CONDITIONS AT ST. ELIZABETHS HOSPITAL

Petitioner claims finally (Pet. Br. 50–51) that "the forcible commitment of any individual to a mental hospital is constitutionally justifiable only upon the

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[9] See also *Bistram* v. *United States*, 248 F. 2d 343, 347 (C.A. 8); *United States* v. *Valdez*, 229 F. 2d 145, 147 (C.A. 2), certiorari denied, 350 U.S. 906; *Austin* v. *United States*, 19 F. 2d 127, 129 (C.A. 9); *O'Hara* v. *United States*, 129 Fed. 551 (C.A. 6); Rule 28, F.R. Crim. P.

assumption that that individual will receive needed psychiatric treatment and rehabilitation." Petitioner purports to demonstrate that the conditions in St. Elizabeths Hospital are inadequate for this purpose (Pet. Br. 18–21).

1. The conditions in St. Elizabeths Hospital are hardly a subject for judicial notice. Whether patients at St. Elizabeths receive adequate care and treatment is not a matter of general knowledge. There is no evidence in the record of the present case to support petitioner's contention that the care and treatment provided at that institution are inadequate. Excerpts from newspaper articles (Pet. Br. 20) have not traditionally been accorded the status of proof of the facts related therein." Testimony of a litigant in another case, decided by the court of appeals almost nine years ago (Pet. Br. 21), can hardly be taken as establishing present conditions in St. Elizabeths Hospital.

" Citation to articles concerning St. Elizabeths Hospital can be a double-edged sword. Compare the "Washington Post" account of one of the wards (Pet. Br. 20–21), not shown to be petitioner's ward (Pet. Br. 20–21), with the following description of the initial reactions of a new patient in the ward for the criminally insane of St. Elizabeths: "* * * [H]e expected cells, rifles, side arms, perhaps clubs and blackjacks. Instead he was escorted to his ward by a fellow patient, introduced around and given a tour of the building. He saw patients working in a shop, editing a newspaper * * * even pitching horseshoes; he heard a patient orchestra practicing; he was told there was patient self-government in Howard Hall and almost no attempts to escape." Spingarn, *St. Elizabeths—Pace-setter for Mental Hospitals*, 212 Harpers 58 (Jan. 1956), cited in Comments, 15 Rutgers L. Rev. 624, 631–632, n. 57. See also "Washington Evening Star," November 22, 1961, p. B–1, col. 4.

Even if, as petitioner requests (Pet. Br. 6), this Court were to take judicial notice of the record of a different proceeding in the district court involving petitioner, the Court would only have before it evidence that petitioner had been placed in a department which housed 1,000 other mental patients under the supervision of two psychiatrists.[9] The Court could not know what ratio of psychiatrists to patients is "adequate" for the care and treatment of petitioner's illness, the extent of the non-psychiatric personnel, or the quality of the facilities.

2. Assuming that St. Elizabeths Hospital, by reason of inadequate staff and facilities, did not provide "adequate" care and treatment, the inadequacy would be a matter for Congress to rectify. As the court of appeals stated in *Overholser* v. *O'Beirne, supra*, slip op., p. 4: "[That the hospital] * * * may have too few psychiatrists or inadequate facilities or that they may not use the appropriate techniques * * * are the business of the legislative, not the judicial branch of government if the statute is valid."

Even petitioner does not suggest that *no* care or treatment is provided.[10] The record contains uncontradicted evidence to the contrary (R. 8). In *Foller*

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[9] Such evidence appears not to be in accord with the actual facts. See testimony of Dr. Overholser in Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess., pp. 508–509.

[10] In *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270, 272, this Court upheld the validity of a Minnesota statute providing for the indefinite incarceration of sexual psychopaths without suggesting that validity of detention under the statute depended upon the availability of treatment.

v. *United States*, 282 F. 2d 732 (C.A. D.C.), the appellant, who had been acquitted by reason of insanity and committed to St. Elizabeths Hospital, contended that his confinement was unjustified because he was not receiving sufficient treatment. The court of appeals held (*id.* at 734) that "the evidence sufficiently demonstrates that appellant is receiving treatment." As an indication of the results of treatment, the court noted in *Overholser* v. *O'Beirne*, *supra*, slip op., pp. 3-4, that "[r]oughly ⅓ of those committed to St. Elizabeths Hospital since 1954 under this statute (D.C. Code 24-301) have been released, including eight who had committed homicide." *

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1961.

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* The court observed that from 1955 to June 30, 1961, 283 persons had been found not guilty by reason of insanity and committed under Section 24-301; 92 had been released either unconditionally or conditionally.

APPENDIX

Section 22–1410 of the D.C. Code (1951) provides:

Making, drawing, or uttering check, draft, or order with intent to defraud—Proof of intent—"Credit" defined.

Any person within the District of Columbia, who, with intent to defraud, shall make, draw, utter, or deliver any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, or order in full upon its presentation, shall be guilty of a misdemeanor and punishable by imprisonment for not more than one year, or be fined not more than $1,000, or both. As against the maker or drawer thereof the making, drawing, uttering, or delivering by such maker or drawer of a check, draft, or order, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in its possession or control, shall be prima facie evidence of the intent to defraud and of knowledge of insufficient funds in or credit with such bank or other depository, provided such maker or drawer shall not have paid the holder thereof the amount due thereon, together with the amount of protest fees, if any, within five days after receiving notice in person, or writing, that such draft or order has not been paid. The word "credit," as used herein, shall be construed to mean arrangement or understanding, express or implied, with the bank or other depository for the payment of such check, draft, or order.

Section 24-301 of the D.C. Code (Supp. VIII, 1960) provides:

> ***Commitment of persons of unsound mind to the District of Columbia General Hospital—Certification to the Court—Acquittal by jury on grounds of insanity—Confinement in a mental institution—Conditions for release after confinement—Conditional release—Expenses—Writ of habeas corpus—Inconsistent provisions of Federal Statutes superseded.***
>
> (a) Whenever a person is arrested, indicted, charged by information, or is charged in the juvenile court of the District of Columbia, for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, it shall appear to the court from the court's own observations, or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, or such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital. If, after such examination and observation, the superintendent of the hospital, in the case of a mental hospital, or the chief psychiatrist of the District of Columbia General Hospital, in the case of District of Columbia General Hospital, shall report that in his opinion the accused is of unsound mind or mentally incompetent, such

report shall be sufficient to authorize the court to commit by order the accused to a hospital for the mentally ill unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial. If the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial, the court shall order the accused confined to a hospital for the mentally ill.

(b) Whenever an accused person confined to a hospital for the mentally ill is restored to mental competency in the opinion of the superintendent of said hospital, the superintendent shall certify such fact to the clerk of the court in which the indictment, information, or charge against the accused is pending and such certification shall be sufficient to authorize the court to enter an order thereon adjudicating him to be competent to stand trial, unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial.

(c) When any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, that fact shall be set forth by the jury in their verdict.

(d) If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.

(e) Where any person has been confined in a hospital for the mentally ill pursuant to sub-

section (d) of this section, and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of fifteen days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from further confinement in said hospital. If the court does not so find, the court shall order such person returned to said hospital. Where, in the judgment of the superintendent of such hospital, a person confined under subsection (d) above is not in such condition as to warrant his unconditional release, but is in a condition to be conditionally released upon supervision, and such certificate is filed and served as above provided, such certificate shall be sufficient to authorize the court to order the release of such person under such conditions as the court shall

see fit at the expiration of fifteen days from the time such certificate is filed and served pursuant to this section: *Provided*, That the provisions as to hearing prior to unconditional release shall also apply to conditional releases, and, if, after a hearing and weighing the evidence, the court shall find that the condition of such person warrants his conditional release, the court shall order his release under such conditions as the court shall see fit, or, if the court does not so find, the court shall order such person returned to such hospital.

(f) When an accused person shall be acquitted solely on the ground of insanity and ordered confined in a hospital for the mentally ill, such person and his estate shall be charged with the expense of his support in such hospital.

(g) Nothing herein contained shall preclude a person confined under the authority of this section from establishing his eligibility for release under the provisions of this section by a writ of habeas corpus.

(h) The provisions of this section shall supersede in the District of Columbia the provisions of any Federal statutes or parts thereof inconsistent with this section.

Rule 9, Municipal Court for the District of Columbia, Criminal Rules, provides:

Pleas.—A defendant may plead not guilty, guilty or, with the consent of the Court, *nolo contendere*. The Court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the Court refuses to accept a plea of guilty, or if a defendant corporation fails to appear, the Court shall enter a plea of not guilty.

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